STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP202-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY C. DENNY

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED JANUARY 2, 2015 IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE HONORABLE JOSEPH W. VOILAND PRESIDING

REPLY OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

Texas Criminal Code

OTHER AUTHORITIES

ARGUMENT

I. Denny Meets the Relevancy Requirement for Deoxyribonucleic Acid (DNA) Testing Under Wis. Stat. § 974.07(2)(a).

The State argues that the evidence Denny seeks for testing is irrelevant because he has not shown that the evidence: 1) resulted in this conviction; 2) contains biological material; and 3) would produce relevant results. (Response at 14-22.) In arguing these requirements, the State misinterprets the language and requirements of the DNA statute.

A. Wis. Stat. § 974.07(2)(a) does not require a movant to prove that the evidence resulted in Denny's conviction.

The State argues that the evidence is irrelevant because it did not "result in" the conviction. (Response at 14; 228:8.) This conclusion contradicts the language of the testing statute. Relevant evidence for purposes of the DNA testing statute is evidence that "is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect." Wis. Stat. § 974.07(2)(a). The clause "resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect" modifies *the specific prosecution or conviction before the court*. Each piece of evidence Denny requested for testing was part of "the investigation or prosecution that resulted in the conviction" because police collected each item from the crime scene and the State entered them against Denny during trial, i.e. his prosecution. Wis. Stat. § 974.07(2)(a).

The State also incorrectly argues that Denny did not meet the State's interpretation of the relevancy requirement because of his conviction as a party to a crime. The State argues that evidence can only be relevant in a party to a crime case if it would "change the overwhelming evidence that Denny participated in [the crime.]" (Response at 14.) Whether testing results would "change" the evidence presented against Denny has no bearing on whether the evidence was relevant to the investigation or prosecution. Police collected the evidence from the crime scene and the State admitted it against Denny alleging that he was an active participant in the crime. Indeed, the State alleges that Denny came into contact with at least one of the items. (Response at 3.) Therefore, the evidence sought for testing is relevant to Denny's investigation and prosecution.

B. Wis. Stat. § 974.07 does not require Denny to prove biological material exists on the evidence requested for testing.

The State asks this Court to rewrite the DNA statute stating, "a defendant should be required to demonstrate a reasonable likelihood that DNA evidence will be found on the evidence to be tested" in order to meet the relevancy requirement. (Response at 15.) However, Wis. Stat. § 974.07 does not require a DNA-movant to prove that the requested evidence contains biological material. Wis. Stat. § 974.07(2)(a) places three burdens (that the evidence is relevant, in the possession of a government agency, and not previously tested) on a movant seeking "deoxyribonucleic acid testing *of evidence*." (Emphasis added.) These three burdens do not require that a movant prove that the evidence contains biological material.

The State insists that to be eligible for DNA testing, a movant must prove that which only testing itself can establish. The first steps in DNA analysis are to determine whether DNA is present, and if so, how much. "Only after DNA in a sample has been isolated can its quantity and quality be reliably assessed." John M. Butler, *Fundamentals of Forensic DNA Typing*, 111 (3d ed. 2010). By demanding that a movant prove the existence of biological material, the State undermines the very purpose of the statute—to facilitate postconviction DNA testing.

In support of its position, the State relies on a Texas case, ***Holberg v. State***, interpreting its postconviction DNA statute to require that a movant prove biological material exists before testing. 425 S.W.3d 282 (Tex. Crim. App. 2014). However, the language of the Texas statute is different than the Wisconsin statute. In ***Holberg***, the Texas statute provided that "a convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing *biological material*." Tex. Code Crim. Proc. Art. 64.01(a-1)(2011)(repealed 2015, emphasis added). Wis. Stat. § 974.07(2) does not contain the phrase "biological material," but simply provides the requirements of a movant seeking testing "of evidence." Further, the statute on which the ***Holberg*** court relied is no longer in effect. The Texas Legislature, recognizing that ***Holberg*** "severely restricts a judge's ability to order DNA testing," recently amended it to create a lesser burden on movants. C.C.S.B. 487 (Statement of Intent); Tex. Code Crim. Proc. Art. 64.01.

Finally, the phrase "biological material" found under subsection (6), creates a right to testing at private expense if the requirements of subsection (2) are met. Wis. Stat. § 974.06(6) provides that a District Attorney "shall disclose" and "shall make available to the movant": (1) the results of

any DNA testing of biological materials; and (2) any evidence that contains biological materials. This subsection expressly creates a duty of disclosure on the District Attorney. The movant could never prove the existence of biological material because he does not possess it.

Imposing a burden on the defendant to prove biological material would upend Wis. Stat. § 974.07. DNA samples may not be detectable by the human eye. National Institute of Justice, DNA Evidence: Basics of Identifying, Gathering, and Transporting, available at: http://nij.gov/topics/forensics/evidence/dna/basics/pages/identifying-to-transporting.aspx (last visited Sept. 12, 2015). The State's proposed requirement would create an insurmountable barrier because, without testing, a movant would not know whether the physical evidence contains biological materials. Further, several items that Denny requested for testing are indisputably biological material, for example the hairs or blood on evidence.

C. The State imposes a non-existent burden on Denny to prove a lack of contamination and degradation.

The State argues that applicants must prove the DNA's purity before testing to show that testing will "provide relevant results." (Response at 20.) The State asserts that Denny fails this requirement because he does not acknowledge the possibility of "cross-contamination and the limitations of touch DNA" and "degradation of DNA". (Response at 20-21.) Again, the State grafts a new requirement onto the statute. The statute requires that the evidence a movant wants tested is relevant to the investigation or prosecution. Wis. Stat. § 974.07(2)(a). Proving "relevant *results*" is not a requirement.

The limitations of DNA testing cannot be known until testing occurs. With the results in hand, the court can consider whether it is more likely that the results reflect innocent transfers (if, for example, the DNA were only found on one piece of evidence), or more likely reflect evidence from the perpetrator (if, for example, the profile(s) were redundant across multiple pieces of evidence). It makes no sense under a statute designed to facilitate post-conviction DNA testing, to deny the testing simply because the State can imagine scenarios in which the results might not turn out to be meaningful.

The State alleges that touch DNA can be contaminated. (Response at 16-17.) Yet the State ignores that prosecutors rely on touch DNA as a powerful tool for law enforcement and criminal investigation. *See*, *e.g.*, ***State v. Carver***, 221 N.C. App. 120, 122, 725 S.E.2d 902 (2012). The possibility of contamination does not make the evidence irrelevant; it at most provides a basis for debating what weight to attach to any results.

Contrary to the State's assertions that police in 1982 did not take precautions to prevent contamination, standards were in place. The Wisconsin Department of Justice's Physical Evidence Handbook provided: "In any criminal investigation, the *validity of information derived from examination of the physical evidence depends entirely upon the scrupulousness with which the evidence has been protected from contamination* … It is of greatest importance that the crime scene be protected from the intrusion of all extraneous factors." Wis. Dep't of Justice, *Physical Evidence Handbook*, 12 (1981). Even in the presence of contamination, a perpetrator's DNA is not removed simply because someone else may have touched the item. *See* an Oorschot, R.A.H. & Jones, M.K., *DNA Fingerprints from Fingerprints*, 387

NATURE 767 (1997).[1] ("[M]aterial left by the last holder was usually present on the tube, that of previous holders was also retrieved to varying extents.")

The State also objects that some of the evidence—such as the hairs—might not yield DNA results, because STR, or nuclear, DNA analysis requires root materials. Yet no one can know if sufficient root material exists to permit nuclear STR testing until the lab analyzes the material. Moreover, the State ignores that nuclear STR testing is not the only type of testing that can be done. Even without a root, the shaft of the hair can be subjected to mitochondrial DNA testing. Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, Wisconsin Lawyer, May, 2002, at FN33. The DNA statute does not require a movant to state which tests an analyst will use.

Finally, Denny is not required to prove that degradation did not occur. Like contamination, it is impossible to determine whether the evidence is degraded without actually testing. Requiring proof that there was no contamination or degradation before testing would turn the DNA statute on its head, rendering it an obstacle, rather than a pathway, to exoneration.

D. The Wisconsin Supreme Court correctly decided ***State v. Moran*** that Wis. Stat. § 974.07 provides for testing at private expense.

As the State correctly acknowledges in its brief, ***Moran*** governs this case and "[t]his Court is obligated to apply the supreme court's holding in Moran recognizing a

[1] Available at http://www.nature.com/scitable/content/11782/10.1038_387767a0.pdf#toolbar=0.

defendant's right to test under subsection (6)." (Response at 22.) Reading (6) as a discovery provision to facilitate DNA testing under (7) only would render the language of (2) meaningless. This is not the law in Wisconsin and Denny has shown that he meets the ***Moran*** requirements for testing at private expense.

II. Denny Meets the Requirements for Testing at Public Expense Under Wis. Stat. § 974.07(7)(a).

The State argues that Denny fails to meet the requirement for testing at public expense under Wis. Stat. § 974.07(7)(a)2. This section provides that a court shall order DNA testing if "it is reasonable probable that the movant would not have been prosecuted, [or] convicted… for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, [or] conviction." *Id*. However, the State argues that this section requires a defendant to show exculpatory results. In doing so, the State misinterprets the language of this statute and argues for additional burdens not contemplated.

A. The "reasonable probability" language of Wis. Stat. § 974.07(7)(a)2 should be interpreted as in ***Strickland***.

The State argues that the "reasonable probability" language in Wis. Stat. § 974.07(7)(a)2 should be assessed under the reasonable probability test for assessing claims of newly discovered evidence. (Response at 26.) However, Denny is not currently seeking a new trial, but seeking DNA testing. If the results of testing support Denny's claims, then Wis. Stat. § 974.07(10) provides separate gatekeeping criteria for granting a new trial.

Other states' have applied the ***Strickland*** standard to their postconviction DNA testing statutes. The Court in ***Strickland v. Washington*** held that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. 668, 671 (1984). The two Connecticut Supreme Court cases cited by the State both utilize this ***Strickland*** standard. ***State v. Marra*****,** 295 Conn. 74, 86-87, 988 A.2d 865, (2010)("Consistent with our decision in ***State v. Dupigney***, supra, 295 Conn. 50, 988 A.2d 851, also decided today … the definition of reasonable probability established by the United States Supreme Court in its Brady-Strickland line of cases applies to § 54-102kk."). Similarly, Vermont also defines "reasonable probability" under its post-conviction DNA statute as "a probability sufficient to undermine confidence in the outcome." ***In re Towne***, 2013 VT 90, ¶ 8, 195 Vt. 42, 86 A.3d 429 (2013)(citing ***Strickland***, 466 U.S. at 694). Similarly, the ***Strickland*** definition of "reasonable probability" should be applied to Wis. Stat. § 974.07(a)(2).

B. Wis. Stat. § 974.07(7)(a)2 requires courts to assume exculpatory results before determining whether there is a reasonable probability of a different outcome.

The State misinterprets the text of Wis. Stat. § 974.07(7)(a)2, arguing that whether a result is exculpatory depends on whether it is reasonably probable that the movant would not have been convicted. (Response at 27.) However, the "reasonably probable" language does not define "exculpatory"; rather, the reasonable probability inquiry is conducted after assuming that "exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense." Wis. Stat. § 974.07(7)(a)2.

The State incorrectly alleges that assuming exculpatory results makes the statute "overly broad" and allows "postconviction DNA testing in every single case where items of evidence that conceivably could contain DNA are recovered from a crime scene." (Response at 31-32.) This is simply not true because the separate statutory requirement that the evidence must create a "reasonable probability of a different outcome" screens out those cases.

The State's definition of exculpatory would render the "reasonable probability of a different outcome" requirement useless and redundant. "[S]tatutes are interpreted to avoid surplusage, giving effect to each word." ***State v. Hemp***, 2014 WI 129, ¶ 13, 359 Wis. 2d 320, 856 N.W.2d 811. "Moreover, words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose." ***State v. Matasek***, 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811. The DNA statute only makes sense as a whole if "exculpatory" is understood in its common sense meaning—as favorable to the defense—and the additional requirement of a reasonable probability of a different result *separately* requires a showing that the exculpatory evidence is of some particular significance after testing is done.

Assuming exculpatory results before determining whether those results create a reasonable probability of a different outcome is consistent with the way those terms are used in other contexts. For example, under ***Brady v. Maryland*** a due process violation occurs when withheld evidence is *both* exculpatory *and* material (defined as creating a reasonable probability of a different outcome). ***Brady v. Maryland***, 373 U.S. 83 (1963). Here, the State's proposed definition of exculpatory would again create redundancy, making the materiality requirement superfluous,

because, according to the State, evidence must be material *in order to be* exculpatory.

The State relies on two Connecticut Supreme Court cases to argue that Denny's DNA results should not be assumed exculpatory. However, the Connecticut Supreme Court actually *did* assume exculpatory results in these cases. In ***Marra***, the defendant wished to use DNA evidence to show that bones and a sneaker admitted at trial were not those of the victim, introducing doubt of whether the victim was actually dead. ***State v. Marra***, 295 Conn. 74, 988 A.2d 865 (2010). In ***Dupigney***, the defendant wished to use DNA testing to show that a hat found at the scene belonged to a third-party. ***State v. Dupigney***, 309 Conn. 567, 72 A.3d 1009 (2013). While Denny agrees with the courts' methodology, the State only looks at the result and assumes that because the court found that there was not a reasonable probability of a different outcome, the evidence was not exculpatory. However, the court did assume exculpatory results before making the reasonable probability analysis: "the absence from trial of even the most favorable DNA test results…does not undermine our confidence in the verdict." *Id*. at 585. The same analysis should be applied to Denny's case; assume exculpatory results and then determine whether there is a reasonable probability of a different outcome.

Finally, Denny presented cases from New Jersey and Tennessee to show how other courts have recognized the necessity of assuming exculpatory results. *See* ***State v. Peterson***, 364 N.J. Super. 387, 836 A.2d 821 (Super. Ct. App. Div. 2003); ***Powers v. State***, 343 S.W.3d 36, (Tenn. 2011). While the State attempts to distinguish the facts of these cases from Denny's, it does not challenge the courts' analysis. The courts assumed exculpatory results, and the same assumption should be made under Wisconsin's statute.

C. The legitimate tendency test does not apply to post-conviction motions for DNA testing.

The State's invocation of the "legitimate tendency test" does not apply to Wis. Stat. § 974.07 motions. The State writes, "[t]he presence of a third person's DNA on the evidence only makes it reasonably probable that a defendant would not have been convicted if the evidence is admissible." (Response at 34.) The legitimate tendency test is reserved for the admissibility of evidence at trial, which is two full procedural steps (testing for DNA evidence, gaining a new trial) away for Denny, and is neither useful nor required in this case. Defendants are not required to show that evidence will ultimately be admissible in a postconviction motion in order to gain relief. *See* ***State v. Love***, 2005 WI 116, ¶37, 284 Wis. 2d 111, 700 N.W.2d 62.

D. Exculpatory DNA results would overcome witness statements and evidence produced against Denny at trial.

Favorable DNA test results in Denny's case would create a reasonable probability of a different result. Denny requests testing on multiple items collected from the crime scene and admitted into evidence. The State alleged that Denny was an active participant in the crime. Redundant profiles across multiple pieces of evidence or a CODIS hit could reveal the perpetrator's identity. While DNA testing can never tell us when it was deposited, the same profile found across multiple pieces of evidence, including the bong that the State alleged the perpetrator touched, minimizes the likelihood that it was left by an innocent person. Any DNA evidence identifying a non-Denny perpetrator would cause a reasonable juror to discredit the statements attributed to

Denny, and could overcome the evidence the State used to link him to the scene of the crime.

CONCLUSION

For the reasons stated above, and in his Brief-in-Chief, Denny respectfully requests that this Court reverse the circuit court's decision and grant him testing at public or private expense.

Dated this 15th day of September, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,998 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of September, 2015.

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