STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No.: 2017AP002452

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE A. REAS-MENDEZ,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED NOVEMBER 27, 2017 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. CONEN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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STANDARD OF REVIEW

This appeal presents questions of interpretation and application of Wis. Stat. § 974.07(7)(a), which are reviewed de novo by appellate courts. *See State v. Denny*, 2017 WI 17, ¶ 46, 373 Wis. 2d 390, 891 N.W.2d 144. The Wisconsin Supreme Court has not decided the proper standard of review to apply to the circuit court's decision regarding whether a movant satisfied the reasonable probability requirement under section 974.07(7)(a)(2). *Denny*, 2017 WI 17, ¶¶ 74-75. The State urges that this Court apply an erroneous exercise of discretion standard. (Resp.Br. 7.) Reas-Mendez maintains that this Court "owe[s] no deference" to the circuit court's conclusion that he did not satisfy the legal standard. *See State v. Pico*, 2018 WI 66, ¶ 33 (citing *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985)).

This Court need not reach the issue because it is unnecessary to resolve this appeal. The circuit court's errors entailed a misinterpretation of the statute and thus requires de novo review. Further, under either standard, the circuit court erred in denying DNA testing here.

ARGUMENT

I. This Court Cannot Engraft Prerequisites to Obtain DNA Testing Absent From the Statute.

For the first time on appeal, the State proposes a wholesale rewriting of the postconviction DNA statute, engrafting prerequisites that require the movant to have testified at trial and present evidence of an alternate suspect, an alibi, a showing of trial counsel's ineffectiveness, and the movant's diligence in order to obtain DNA testing. The State's arguments should be rejected as an improper attempt to rewrite the statute, undermine legislative intent, and contravene all court precedent interpreting the statute.

Throughout its brief, the State argues the circuit court correctly denied Reas-Mendez DNA testing because he failed to show new evidence of a third-party perpetrator.[1] (*See* Resp.Br. 18-19) (claiming pleadings are insufficient because Reas-Mendez did not introduce "new third-party-perpetrator evidence" or meet the "legitimate tendency" requirement to introduce third-party evidence at trial); (Resp.Br. 20) (arguing Reas-Mendez is not entitled to have the DNA profile of a third-party found on the tested evidence uploaded onto the national DNA database to identify the perpetrator, without first identifying the perpetrator); (Resp.Br. 21-24) (claiming the pleadings were "conclusory" because they did not "identify a third-party perpetrator"). Similarly, the State claims that in order to "trigger the presumption of exculpatory results" Reas-Mendez must present new facts such as a "third-party confession, a new eyewitness," an alternate suspect, or new physical evidence. (Resp.Br. 29, 24-30.)

The plain language of the statute, however, has no such prerequisites. *See* Wis. Stat. § 974.07(7)(a)(2). This Court cannot judicially engraft one absent "plain and persuasive authority." *State ex rel. Block v. Circuit Court for Dane Cty.*, 2000 WI App 72, ¶ 12, 234 Wis. 2d 183, 610 N.W.2d 213. Moreover, no court applying this statute has engrafted a prerequisite to triggering the presumption of exculpatory results.[2] *See, e.g., State v. Denny*, 2017 WI 17, ¶ 76. ("The State does not dispute that we are to assume for purposes of this analysis that if DNA testing were to occur, the results would be 'exculpatory.'").

Judicially engrafting such a requirement would also contravene the legislature's intent to free the wrongfully convicted and identify previously

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[1] Notably, although the circuit court erred in denying testing, it did not do so based on these meritless arguments.

[2] This prerequisite would have prevented serial killer Walter Ellis from being identified as the true, yet unsuspected perpetrator of the crimes for which Chaunte Ott and William Avery were wrongfully convicted. *See Ott v. City of Milwaukee*, 291 F.R.D. 151, 153 (E.D. Wis. 2013); *Avery v. City of Milwaukee*, 40 F. Supp. 3d 1089, 1091 (E.D. Wis. 2014).

unknown actual perpetrators through DNA testing.[3] Engrafting a requirement onto the statute requiring innocent defendants, who have no reason to know who committed the crime, to identify the perpetrator thwarts the legislative intent by imposing an impossible hurdle and preventing the identification of the actual, yet unsuspected perpetrator.

Though no evidence of an alternate perpetrator is required to obtain testing, there was such evidence presented at trial and the State mischaracterizes the record when it suggests otherwise. (Rep.Br. 18.) As both the trial court and prosecution told the jury, the identity of the perpetrator was a central issue at trial. (R. 99:16-17, 24 ("This is a case about do we have the right person.") The victim initially believed an apartment maintenance worker was the perpetrator. (R. 31:3-4; 97:84-86; 98:34-35; 99:32.) The defense challenged her identification of Reas-Mendez as unreliable.[4] (R. 97:76-89; 99:29-35.) The State appears to claim that Reas-Mendez's claim of innocence is insincere because he exercised his constitutional right to silence and did not present an alibi. (Resp.Br. 18.) Reas-Mendez, however, has always maintained his innocence. Reas-Mendez only became a suspect because he was the victim of an unrelated assault by two men in the apartment complex as witnessed by an innocent bystander who called 911 and a police officer who saw him running from the men. When Reas-Mendez was arrested in the attic of a nearby building shortly after the assault by the two men but eight hours after the sexual assault, he explained he was hiding from the men, expressed confusion when he was

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[3] As former Representative, now Governor Scott Walker, who co-authored the legislation explained: "'Whether it's proving someone's guilt or someone's innocence, in either case, it keeps us safer because if somebody is innocent, that means somebody who's guilty is still out there, and we can use that evidence to get them off the streets.'" Dee J. Hall, *Nine people freed on strength of DNA testing in Wisconsin*, WisconsinWatch.org, Dec. 13, 2009, http://wisconsinwatch.org/2009/12/nine-people-freed-on-strength-of-dna-testing-in-wisconsin/.

[4] The State's reliance on the victim's claim that the photo array did not influence her live-lineup-identification, (Resp.Br.4), is seriously uniformed. The voluminous psychological research of the last decade has shown that eyewitness memory is easily tainted, despite witness unawareness of tainting influences. (*See* Op.Br. 22-23 (describing literature).)

accused of the sexual assault, and denied any involvement. (*See* Op.Br. 24.)[5]

Finally, the State improperly attempts to engraft time limits into the statute. Contrary to the clear statutory language allowing postconviction motions for DNA testing "[a]t any time after being convicted of a crime," Wis. Stat. § 974.07(2), the State would bar testing unless the movant can show diligence and proof that trial counsel was ineffective in failing to seek testing. (*E.g.*, Resp.Br. 14) (claiming that because Reas-Mendez did not challenge the fingerprint evidence at trial, "[i]t is too late for him to challenge it now"). The State's attempt to engraft a diligence requirement is contrary to the plain words of the statute allowing for testing "at any time." It is also contrary to the explicit intent of the legislature to remove procedural bars, applicable to other postconviction motions, in recognition that such bars should not prevent courts from ordering DNA testing to exonerate the innocent and identify the actual perpetrator.[6]

II. The State Conflates the Exculpatory-Results Assumption with the Reasonable-Probability Analysis.

The State defends the circuit court's order by conflating the exculpatory-results assumption with the reasonable-probability analysis and distorting Reas-Mendez's arguments.

The State argues that the motion "failed to show a reasonable probability that

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[5] The State's claim that Reas-Mendez cannot now raise this evidence, which is supported by police reports, rather than conclusory assertions, is incorrect. *See State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis.2d 568, 682 N.W.2d 433 (contrasting conclusory assertion based only on defendant's opinion, with a defendant's assertion relying on outside sources, such as police reports). The State's assertion that trial counsel reasonably and strategically chose not to introduce this evidence at trial, (Resp.Br. 14), is unsupported by any evidence and irrelevant to the current inquiry regarding whether Reas-Mendez should be entitled to testing, rather than a new trial.

[6] *See* Wisconsin Legislative Council Staff Memorandum from Anne Sappenfield, Senior Staff Attorney, to Representative Scott Walker, re 2001 AB 291, at 4 (Apr. 2, 2001), https://docs.legis.wisconsin.gov/2001/related/public_hearing_records/ac_corrections_and_the_courts/bills_resolutions/01hr_ac_cc_ab0291_pt01.pdf (on file with the Legislative Reference Bureau).

a third-party perpetrator's DNA will be found on any of these items." (Resp.Br. 18.) The statute does not require such a showing. The State conflates the exculpatory-results assumption with the subsequent analysis as to whether, given such assumption, there is a reasonable probability the movant would not have been convicted. In this instance, the court must assume the results would exclude Reas-Mendez and include a third-party.[7] Given that this was key evidence used to connect Reas-Mendez to the crime, there is a reasonable probability at least one juror would have had a reasonable doubt about his guilt if the DNA excluded him and connected the evidence to a third-party.

The State's conflation is also apparent when it cites *State v. Dean*, 708 N.W.2d 640, 644 (Neb. 2006), to claim that the "'dispositive question'" is whether the testing would produce "'exculpatory evidence.'" (Resp.Br. 12.) The Nebraska postconviction DNA statute in *Dean* differs from Wisconsin's in a fundamental way. Nebraska's statute requires a showing that the DNA testing may "produce noncumulative, exculpatory evidence." Neb. Rev. Stat. § 29-41205(c). By contrast, under Wis. Stat. § 974.07(7)(a)2., exculpatory results are assumed, and the court must ask if there is a reasonable probability that the defendant would not have been convicted if the exculpatory DNA results were available.

The State also repeatedly distorts Reas-Mendez's arguments regarding the required analysis. The State falsely portrays Reas-Mendez's argument as a claim that because the statute presumes exculpatory results, testing is required based only upon an allegation of innocence. (Resp.Br. 24 referring to Op.Br. 11-12.) The State also mischaracterizes Reas-Mendez's argument as advocating an "anything is possible" standard. (Resp.Br. 16 referring to Op.Br. 13.) Only by distorting Reas-Mendez's claim can the State repeatedly assert that he argues for testing upon

[7] The State's claim that the absence or presence of Reas-Mendez's DNA on the jacket and knife is irrelevant, (Resp.Br. 13-14), is meritless. The absence of Reas-Mendez's DNA and presence of a recurring third-party DNA on the evidence would be significant, given that the victim tied all of them to the crime.

demand, with no limits, so that "every" piece of crime scene evidence "that someone deemed []relevant" must be tested.[8] (Resp.Br. 27.) Reas-Mendez made no such arguments. (*See* Op.Br.11-12.) The movant must do more than claim innocence and show relevance; he must also show that if the DNA results are exculpatory, there is a reasonable probability he would not have been convicted. That is the limiting principle the legislature created. And that is the limiting principle that the Supreme Court invoked to deny DNA testing in *State v. Denny*. There, the Court concluded that, given the overwhelming evidence of guilt ("dozens" of separate confessions or inculpatory statements, among other things), DNA evidence excluding Denny, or even identifying a third party, would not *in that case* create a reasonable probability of a different result, because all it would show is that Denny committed the murder with an accomplice. *See Denny*, 2017 WI 17, ¶ 78. That analysis shows that assuming exculpatory results—including third-party DNA—and then assessing whether those results create a reasonable probability of a different result does not create a limitless testing-upon-demand scheme.

But unlike *Denny*, the reasonable-probability analysis is no barrier to the testing under the facts of this case. Here, the victim's account makes clear there was no accomplice, but rather a single perpetrator. If the DNA results not only exclude Reas-Mendez, but also identify a third-party's DNA on multiple items, or match a convicted offender, those results would indeed create a reasonable probability of an acquittal.

[8] Reas-Mendez does not claim that "every" piece of evidence in this case must be tested. The evidence Reas-Mendez seeks to test was the key evidence introduced by the prosecution to tie him to the crime.

III. The Circuit Court and the State Incorrectly Interpret the Reasonable-Probability Standard to Require Proof that Reas-Mendez Could Not Have Committed the Offense.

The circuit court also erred in interpreting the reasonable probability standard to require a showing that Reas-Mendez "couldn't have committed the offense." (R. 87:4.) Although the State concedes that exculpatory DNA fingerprint evidence may "create [a] reasonable doubt," the State claims testing should be denied because it would not exonerate Reas-Mendez. (Resp.Br. 27.) This interpretation appears to mirror the errors of the circuit court, requiring a showing that would create absolute certainty that the defendant was innocent, rather than a reasonable doubt. Whether the reasonable probability standard is defined to mean that the new evidence undermines confidence in the outcome, as urged by the defense in *Denny*, or to create a reasonable doubt, as urged by the State in *Denny*, *see Denny*, 2017 WI 17, ¶ 81 n.21, the standard cannot be interpreted to require a showing of absolute certainty that the defendant could not have committed the offense. The statute sets the standard: the movant must show a reasonable probability of a different result, nothing more.

IV. The Circuit Court and State Fundamentally Misunderstand Microscopic Fingerprint Evidence.

The State also errs when it claims the presence of a third-party's DNA "elsewhere" on the fingerprint lift card would not matter as it would not negate the microscopic fingerprint evidence identifying Reas-Mendez. (Resp.Br. 15.) Reas-Mendez is not seeking DNA testing of biological material "elsewhere" on the lift card. Reas-Mendez seeks testing of the biological material that forms the fingerprints (the oils and cells deposited by the finger to create the print). Exculpatory DNA results of the fingerprints would show the fingerprint match to Reas-Mendez was incorrect.

Moreover, by uncritically accepting the fingerprint analyst's claim that the fingerprint could not have come from anyone except Reas-Mendez (Resp.Br. 3,16), the State appears to believe that fingerprint matching is infallible, and that even DNA testing cannot overcome it. That assumption, which permeates the State's brief, is simply wrong as a matter of science. As the National Academy of Sciences concluded in its standard-setting 2009 report on forensic sciences, "subjectivity is intrinsic to friction ridge analysis,"[9] and "claims that these analyses have zero error rates are not scientifically plausible."[10] The circuit court and State's insistence that exculpatory DNA results would not undermine the fingerprint match ignores the scientific consensus that DNA is more reliable than fingerprint evidence. (*See* Op.Br. 13-16.)

The State also maintains the court properly denied a hearing to present testimony of a lab analyst regarding the process for preserving the integrity of the fingerprints. The State claims the circuit court was correct to "believe[]" the State over Reas-Mendez that testing would destroy the integrity and further asserts, without any evidence, that "experience teaches" that DNA testing would destroy the evidence. (Resp.Br. 16-17.) In contrast to the State's uninformed, conclusory claims, the defense cited a specific case where digital copying of fingerprints had been used to preserve the evidence in order to do DNA testing. (Op.Br. A-App. 203.) Without a hearing, the circuit court was not free to "believe" the State, which presented no evidence, over Reas-Mendez, who proffered evidence that the integrity of the fingerprints could be preserved. It was improper for the court to resolve this factual dispute without a hearing where the conflicting facts presented involved credibility determinations. *See generally*, *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.

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[9] National Academy of Sciences, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, 139 (2009).

[10] *Id*. at 142.

V. There is no evidence that the knife and jacket have been tampered with, replaced, or altered, and even if they have been handled by others, DNA testing can establish the integrity of the evidence.

The State claims that Reas-Mendez has not met the chain-of-custody requirements under section 974.07(7)(a)4 based on the supposition that the knife and jacket "could have been handled and contaminated" by others between the commission of the crime and their discovery by police. (Resp.Br. 12-13.) In so arguing, the State disregards that the victim who identified the items did not say their appearance had been materially altered in any respect. (R. 97:71-72.) The feckless nature of the State's claim becomes apparent if one were to imagine the position the State, and any court, would take if forensic analysis had linked the jacket and knife to Reas-Mendez; without doubt the State would offer the evidence as proof of guilt, and no court would have problems with the chain-of-custody just because the evidence was found in a public space hours rather than minutes after the crime.

Furthermore, the State ignores the provision of the statute that explicitly states that DNA "testing itself can establish the integrity of the evidence." Wis. Stat. § 974.07(7)(a)4. In the circuit court, Reas-Mendez explained that through DNA testing a lab technician could identify if there was a mixture of profiles on the evidence and determine whether the defendant's DNA profile could be excluded. (R. 86:5.) Reas-Mendez requested an opportunity to present testimony from an analyst to explain how this process works. (R. 86:6.) To the extent the circuit court denied the request for DNA testing based on the contested question whether testing can establish the integrity of the evidence, the court erred in doing so without providing Reas-Mendez an opportunity to be heard. *See Allen*, 2004 WI 106, ¶¶ 12-13. Further, as explained in the opening brief, and not addressed by the State, the circuit court relied on a clearly erroneous belief that Reas-Mendez was found wearing the jacket, rather than that it was found on the street outside the apartment.

(Op.Br. 18-19.) The circuit court erred in relying on this incorrect understanding of the undisputed facts to deny testing.

CONCLUSION

This Court should reverse and order testing.

Dated this 18th day of July, 2018.

Respectfully Submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of the brief is 2,925 words.

Dated this 18th day of July, 2018.

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CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 18th day of July, 2018.

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