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STATE OF WISCONSIN

COURT OF APPEALS

District I

2018AP000591-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

LC No. 00-CF-3635

V.

ANTONIO L. SIMMONS,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POSTCONVICTION DNA TESTING ENTERED JULY 21, 2017 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM POCAN PRESIDING, AND FROM DECISIONS AND ORDERS DENYING MOTIONS FOR RECONSIDERATION AND SUPPLEMENTAL BRIEFING ENTERED ON FEBRUARY 20, 2018 AND MARCH 9, 2018 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

ROBERT N. MEYEROFF
SBN: 01014246
Attorney for Defendant-Appellant
633 West Wisconsin Avenue, Suite
605 Milwaukee, WI 53203-1925
PH: (414)276-8404
FAX: (414) 276-1130

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REPLY TO RESPONDENT'S ISSUES.

Simmons objects to the State's reframing his issues. (State P.1). The State's analysis of all Simmons claims are also objected to as they are all "contradicted" by the record in this case and Simmons' Chief brief.

1. This court should affirm the circuit court decisions denying Simmons §974.07 motion because Simmons did not satisfy its requirements". (P.1).

Reply: The circuit court assumed Simmons met the requirements of 974.07(a). (App-108).

2. Simmons has not shown relevancy on the bullet casings and "identifying Simmons as the person who shot two of them and fired at a third". (P. 2).

Reply: The circuit court did not determine "relevancy" as not being met and no witness in this case ever said "Simmons shot two of them and fired at a third".

3. The State's quotes from 2004 WL1698068 are erroneous based on the record facts contradicting that court's findings, as follows: Ramsey also stated that he believed a customer might have handed Simmons a .25 caliber pistol. (P 3).

Reply: Ramsey actually stated one of the guys is a patron, *tried* to slip him a pistol, I told him we don't play that. (R.142:134). Further, Ramsey said the pistol was the size of a .25. He saw the shooter shooting and it was not a .25, it was a 9mm, he shot too many times for it to be a .25. (R.142:150).

4. According to Armbruster, the white car was found abandoned 11 blocks away and Officer Davis told him a woman was standing near the car and he did not see anyone else exit it. (P.4).

Reply: See Davis report (App-122). *"The vehicle was located at 3519 W. Congress with one occupant identified as Zakea Jones".*

5. True, Armbruster recovered a .380 casing from the white car (P.4).

Reply: And a small bottle of champagne, a bottle of Brandy on the front floor passenger seat and under the seat. Behind the passenger seat was a black baseball cap with a New York Mets symbol in blue, just north to the vehicle, a silk head wrap and 2 shoes black in color. (APP-121).

6. Jones believed that the victim shot based on his belief that Simmons was in the car." (P.6).

Reply: Jones actually said "my intent was not to fire the weapon to do harm, but it was fired in fear because I seen the victims gun and I thought he was going to shoot at us because he thought Antonio was in the car". (APP-120).

7. Respondent relies on ineffective assistance of counsel (IAC), determinations made by the court in 2006AP731 and 2007WL755095. (P. 7-8).

Reply: Those IAC claims were not viable for this court to make any factual or legal findings due to the lack of trial and postconviction counsel's testimony as no ***Machner*** hearing was held. ***State v. Curtis***, 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998). (citing ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979)). This court cannot review IAC claims absent a ***Machner*** hearing.

Furthermore, this Court is not a fact finding Court. ***State v. Ramirez***, 228 Wis.2d 561, 598 N.W.2d 247 (Ct.App.1999).

8. **Reply** to (P.11). Deferential review is not proper when, as here, the circuit court's denial of proffered evidence implicates a defendant's right to present a defense, the decision not to allow the evidence is a question of constitutional fact that this court review *De novo*. ***State v. Knapp***, 2003 WI 121, ¶173, 265 Wis.2d 278 vacated and remanded, 542 U.S. 952, 124 S. Ct 2932, reinstated in material part 285 Wis. 2d 86 (2005).

9. The State makes many references to someone slipping Simmons a gun, stating Ramsey testified to that. (See ¶3). Accepting that as true and agreeing the attempt was completed and Simmons got that gun from a male customer, there has never been any evidence in this case to indicate Jones ever touched that gun or that C-Note ever touched that gun or that either of them loaded the magazine in that gun. So what if Jones or C-Note's DNA is on those casings? The impact would be monumental on the investigation, prosecution, and conviction. Its reasonably probable that Simmons would not have been prosecuted or convicted, if exculpatory DNA testing results had been available "*BEFORE*" the prosecution, or conviction". 974.07(7)(a)2.

10. Actual trial evidence shows that 7 shots (total) were fired into the opera window of P.G'S vehicle. (R.143:55-57). Detective Dubis stated that he didn't see any connection between the 42nd and Capitol crime scene and the white car scene at 35th and Congress. The 9mm casings were found at 35th and Congress.

However, ADA Shomin argued to the jury: "J.G., his sister P.G. and A.C. are in a car that car is shot up repeatedly with 7, 8, 10 bullets (R.143:102)…7 of them were into the opera window where J.G. is sitting, J.G. gets hit 8 times" (R.143:103)… "one man is shot 8 times, one woman is shot once…when again, 7, 8, 10 bullets are flying at the car." (R.143:105).

Those 9mm casings were used as evidence to convict Simmons because victims claiming 10-12 shots were fired. (R.142:118-119).

Simmons now moves for a new trial in the Interest of Justice based upon the Attorney General conceding that the 9mm casings are not relevant that no connection is found, binding 9mm casings to the crime Simmons is convicted of and that these 9mm casings do not make the existence of any fact of consequence more or less probable to whether Simmons shot the victims. (PP. 19-21). §752.35.

The 9mm casings were relevant to Simmons conviction so they are relevant now. If not, then a new trial must be ordered due to such (critical evidence to the State's case against Simmons) irrelevant evidence being used against Simmons, causing a structural defect in his trial proceedings. ***Arizona v. Fulminante***, 499 U.S. 279, 111 S.Ct. 1246 (1991). Harmless error cannot be found. ***Sullivan v. Louisiana***, 508 U.S. 275, 113 S.Ct. 2078 (1993). The ADA pounded home "7, 8, 10 shots into them" causing another structural defect! (R.143:102, 103, 105). See exhibits 3 and 4 (R.11). As for the State's relevancy argument on theses casings they waived this argument. This court will not address issues raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140 (1980).

The respondent is playing fast and loose with the court. ***State v. Petty***, 201 Wis.2d 337, 548 N.W.2d 817 (1996). Respondent's position now is clearly inconsistent with his earlier position. ***State v. Johnson***, 244 Wis.2d 164, (Ct.App. 2001), 628 N.W.2d 431. Furthermore, the State concedes only 7 shots were fired, they do not dispute Simmons description of the shots. Simmons Chief brief p. 25 regarding J.G.

11. Once again, the State attempts to graft a whole new subsection onto §974.07(2) relevancy requirement. The movant does not have to prove that the requested items contain DNA or biological material. (P.18). See its own cited case ***State v. Denny***, 368 Wis. 2d 363 ¶¶42-45, 878 N.W.2d 679 (Ct.App.2016).

12. As for the head wrap, hat, liquor bottles, and shoes? The State claims these items were never in the actual or constructive possession of a government agency. (PP. 1,20-22).

Reply: Constructive Possession is, by its own definition, a crime scene that is taped off with crime scene tape and taken over by police. ***Black's Law Dictionary Tenth edition***. ***State v. Peete***, 185 Wis.2d 4, 16, 517 N.W.2d 149 (1994), "An item is also in a person's constructive possession if it is in an area over which the person has control and the person intends to exercise control over the items". See also ***State v. Oinas***, 125 Wis. 2d 487, 373 N.W.2d 463. "A van impounded by the State and stored in a private owned garage was still constructively possessed by the State."

On top of this, the record *proves* these items exist (APP-121) and quite possibly were either tested by the Wisconsin Crime Lab (WCL) or in WCL'S possession. (R.78 Exhibit 12), "Our records indicate that other evidence was submitted to the Laboratory with respect to this case. No DNA testing was performed on the evidence submitted to the Crime Lab". (R.78 Exhibit 14). WCL then decided to clam up and demanded counsel obtain a "waiver of privilege from the prosecutor that handled Simmons' case". (R.78 Exhibit 16).

13. Respondent also asserted Simmons declined to introduce Jones' statement that C-Note was the driver. (P. 4).

Reply: Not true at all. Simmons never declined use of Jones' statement C-Note was the driver. She never said that.

14. Respondent makes duplicitous claims stating Simmons knew that the police destroyed other evidence years earlier including two shirts that were collected but not received into evidence (P. 21).

Reply: *The police never notified Simmons of their intent to destroy any evidence in this case*. No letters of any kind at all. §968.205(2) provides that, if physical evidence is in possession of a law enforcement agency includes biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction… and the biological material is from a victim of the offense… the law enforcement agency *shall preserve* the physical evidence until every person in custody as a result of the conviction… has reached his discharge date. The State offers no legal explanation for the shirts being

destroyed by police. No copies of letters notifying Simmons of their intent to destroy any evidence. Nothing! Failing to preserve evidence it knew contained biological material is bad faith. ***State v. Luedtke***, 2015 WI 42, ¶¶7, 79, 362 Wis. 2d 1; ***U.S. v. Elliot***, 83 F. Supp.2d 637, 647 (E.D. Va. 1999) (For purposes of determining whether government violated due process rights of defendant by destroying evidence, failure of government to follow established procedures is probative evidence of bad faith). The State offers no proof whatsoever, that any evidence in police custody was legally destroyed or legally not collected.

Even a circuit court judge recognizes the fact that police collect all types of evidence in "say a shooting… the police know little of the details of the shooting so they collect and preserve everything that might help them solve the crime, every item that seems like it might relate to the crime they are investigating ... they pick up items lying about the vicinity such as weapons, *shell casings*, and *clothing*… and personal items such as… pipes, *bottles, hats* etc". ***Id*** at 4 District I decision in ***State v. Hennings***, 2013 Wisc. App. Lexis 833. Judge Sankovitz statement above as used by this very court, the Honorable Lundsten, Higginbotham, and Kloppenburg, indicating the above facts are common knowledge in the Justice system and law enforcement arenas. See opinion attached.

The hat, head wrap, bottles of alcohol, bullet casing .380, and seven casings from a 9mm, the shoes, fingerprints, crime scene photos were all evidence in this case. The only items collected were shell casings? The police put yellow placards

next to every item listed above, all numbered and all photographed and recorded in a crime scene diagram (APP-137). At the time of these events occurring, the police did not know who the shooter was. So, why wouldn't they collect items known to have DNA on them? Hats have sweatbands in them and hair from the user, same with head wraps, same as bottles have a person's saliva on them, shoes have a person's sweat on them and bullet casings have touch DNA and fingerprints on them all items police would procedurally take into evidence.

The property inventory sheets on the two shirts are the only evidence that the police documented as destroyed. (Unauthorized by 968.205(2)(3)(4) and (5)). Where is the rest of the evidence? Nobody addressed that until Judge Hansher ordered the ADA to respond. (APP-110). Even that affidavit is not addressing the anomaly of the documented missing evidence hat, bottles etc.

The State asserts detective Charles affidavit puts to rest the evidence sought for testing. (PP.10,22). The State asserts the items were either turned over or destroyed and then asserts "several items Simmons identified in his motion, bottle hat, shoes etc, were never placed on inventory". Charles never made such a statement. (R.93:2.). There has been no proof offered by the State or the police showing the evidence was never collected or placed on inventory. How would Simmons know before he filed his 974.07 motion that the evidence doesn't exist? Proof? The State makes nothing but conclusory allegations with no proof supporting them. (R.78 Exhibit 25 shows counsel doesn't know what was tested or

available to test). Charles was "*never*" asked to verify the hat etc evidence in Simmons' motion.

15. The only clothing witnesses claimed Simmons wore was a shirt described differently by two witnesses. No other descriptions. (APP-104, APP-106). (P. 27).

Reply: According to the State hypothesis, Simmons would be naked except for a shirt. Furthermore, the State failed to raise this argument in the circuit court. ***Ehly*** at 443.

16. Accusations outrageous? (P. 28).

Reply: Compare police statements to trial testimony it is clearly proof all four witnesses and Armbruster lied to the jury (APP-100-106). The State waived this argument by not addressing it in the circuit court. ***Ehly***,supra.

17. (R.142:123-24) proves all four witnesses discussed the case with each other multiple times before the trial. A.C. admits this and the State concedes. (Simmons' Chief brief p. 20).

18. "Simmons attacks Armbruster veracity throughout the brief". (P.36).

Reply: Armbruster proof in the case cited speaks for itself. The 7th Circuit used all of those as fact and it found that the detectives pressure and inducements on Randolph, Kent, and Kimbrough were also ***Brady*** violations. It is clear from reading this case (APP-153-161), that Armbruster is an evidence fabricator. The fact that the State finds this "not true" is bewildering. The District Court erred and the 7th Circuit reinstated the claims against the detectives. Facts are facts.

19. Simmons third party defense and ***Kyles v. Whitley***, 514 U.S. 419 (1995), arguments speaks for itself. The State's assertions aren't even on point to Simmons' claims. (PP. 32, 35).

Reply: Nobody said C-Note shot anyone. And to say Simmons put forth a third party defense at his trial is misstating the record. See Simmons Chief brief pp.18-36. Again, the State waived this argument in the circuit court. ***Ehly*** supra.

If the jury heard Jones confess to them that she committed the crime and DNA corroborated her confession, Simmons would not be convicted. DNA of Jones on the casings is direct evidence of her guilt. C-Note's identity would allow Simmons to get a witness to further support the third party defense.

The State attempts to claim Jones changed her story with Armbruster but that attempt fails when we have an affidavit from Jones confessing, claiming she never told Armbruster such things as he claimed (APP-120), and stated it in the circuit court sentencing proceedings. (R.145:2,14), (R.146:5), (R.147:46-47). The State offers no evidence to support its assertions. Only a claim that Armbruster said she changed her story. No testimony from him. No affidavit.

20. The 2017 MPD protocols are virtually the same as from 2000. 2000 isn't available. Additionally, the State has never raised such a claim, did not object to the 2017 protocols being in the trial record and never objected to it being in the appellate record prior to briefing therefore waiving any claim. ***Ehly*** supra.

Then the State goes on to violate the very thing they say of Simmons by offering this court a website from 2015 information. (P.20). The State objected to

Simmons adding photos in the record and now they are doing the same. Counsel asks this Court to disregard the State's DOJ guidelines from *2015* as being outside of the record in these proceedings and as an unfair surprise on counsel, and its not 2000 protocols!

21. The State waived every argument in its brief except the "reasonable probability" requirement for DNA testing. ***Ehly*** *supra*.

22. The State concedes to Simmons claims that the victims and Ramsey's police statements contradict their trial testimony and that those statements are relevant and admissible evidence impeaching all four witnesses. ***Charlois Breeding Ranches v. FPP Securities***, 90 Wis.2d 97, 109, 279 N.W.2d 193 (Ct. App. 1979).

23. The explanation of third party evidence in ***State v. Wilson***, 362 Wis.2d 193, 864 N.W.2d 52 makes it clear that Simmons was denied a third party defense and that it's relevant to the "*investigation*" and "*prosecution*" in this case. See Chief brief 30-36).

24. The State's response at 34, states James Ramsey identified Simmons.

Reply: The police never produced a police report containing James Ramsey's statement. The State has failed to support its claim with such a statement. Who is James Ramsey? Unsubstantiated statements cannot be used as evidence under 974.07(7)(a)2, and 968.03(6) bars its use.

25. At page 7 of Simmons motion for DNA testing, (R.77 pp.7-12) Simmons sets forth all of the efforts he went through chasing after the evidence he seeks to

have tested, he cited every exhibit in (R.78) as seeking the evidence, only to be stonewalled by the DA, ADA, W.C.L, D.O.J and money he used hiring attorneys to help him in his efforts, only to run in to a total lack of actual honesty on any of the above named mentioned entities until a Judge finally ordered the State to go on record with what's available to test and what happened to the evidence. (APP-110). Even their response lacks credibility.

These efforts of Simmons began in *2004*, attorney Cook in 2005 also sought the evidence (R.78 Exhibit 37 pages 1-3). In 2006 Simmons saw the crime scene photos approximately 60 of them. The crime scene photos showed yellow placards with black numbers on them next to all the items he seeks to have tested, crime scene placards prove constructive possession. As the court can see, Simmons cannot be faulted for any lack of effort in seeking this evidence. The fact that the circuit courts had all of this information in front of them belies the State's argument (P.22), claiming Simmons never provided the circuit court with any reason to believe the items to be tested were in the constructive possession of a government agency. The State has the photos in their file, so why are they arguing against constructive possession when they are a government agency that constructively possessed the evidence sought. See ¶12.

26. As the State concedes, "The police inventoried and possess a VHS tape of inside the Cap Tap bar and it shows Simmons, J.S.G and others…". (P. 37).

Reply: MPD inventory #0134255 (APP-106). This tape also confirms that the six people that wrote affidavits for Simmons were present in the bar. See video which the State has possession of. So why are they arguing Simmons' affidavits are stale? Those were people in the bar that witnessed the events and the police never interviewed any of them according to the record! Did they destroy the video too? Seems to be a common theme in Milwaukee and in this case.

CONCLUSION

For the reasons above, and in his Brief-in-Chief, Simmons Prays this Court reverse the circuit Court's decisions and grant him testing. Once ordered Simmons request an evidentiary hearing on any claim of evidence not existing, not collected, and or destroyed. Finally, Simmons requests a new trial in the Interest of Justice. §752.35.

Respectfully Submitted this 12 day of February, 2020

ROBERT N. MEYEROFF S.C.

By: Robert N. Meyeroff

ROBERT N. MEYEROFF
SBN: 01014246
Attorney for Defendant- Appellant

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rule contained in s. 80919(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated this 12 day of February, 2020

Robert N. Meyeroff

ROBERT N. MEYEROFF

CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby that I have submitted an electronic copy of this reply brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic reply brief is identical in the content and format to the printed form of the brief 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 12 day of February, 2020

Robert N. Meyeroff

ROBERT N. MEYEROFF

2013 WL 5477367
Only the Westlaw citation is currently available.

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,
v.
Charles Edward HENNINGS, Defendant–Appellant.

No. 2012AP2229–CR.
|
Oct. 3, 2013.

Certification by Wisconsin Court of Appeals.

Before LUNDSTEN, HIGGINBOTHAM and KLOPPENBURG, JJ.

Opinion

***1** This case concerns the construction of the statutory test for postconviction deoxyribonucleic acid (DNA) testing at public expense. Specifically, this case hinges on the proper interpretation of the language of WIS. STAT. § 974.07(7)(a)2. [1] The State argues, and Judge Richard J. Sankovitz of the Milwaukee County Circuit Court agreed, that the interpretation urged by Charles Hennings, the defendant, could result in an unreasonably high volume of speculative motions for ultimately non-exculpatory postconviction DNA testing at public expense, contrary to the intent of the legislature as expressed in the statute as a whole.

Because the resolution of this dispute is of statewide significance and will have statewide impact on the courts, law enforcement, criminal defendants, crime victims and, potentially, a significant effect on the functioning of the State Crime Laboratory, we certify this appeal to the Wisconsin Supreme Court for its review and determination.

Background

Charles Hennings was convicted of felony murder after a second trial, and sentenced to a sixty-year prison term. He filed a motion for postconviction DNA testing under WIS. STAT. § 974.07(2) and (7)(a), requesting testing of the evidence collected from the scene of the victim's murder. He sought to have the genetic profiles obtained from the DNA testing compared with the DNA profiles of offenders stored in DNA databanks. Hennings asserted that " 'redundant profiles,' " meaning DNA of the same person found on more than one of the items, would establish a pattern pointing to another person "who had 'no innocent reason for leaving the evidence behind." '

The circuit court denied Hennings' motion for DNA testing at public expense, but granted his request to conduct the DNA testing at his own expense. The circuit court's resolution of Hennings' motion turned on its interpretation of the requirements of WIS. STAT. § 974.07(7)(a). As discussed below, the circuit court adopted a view of the statute advanced by the State on appeal. This interpretation led the court to deny Hennings' motion because Hennings failed to demonstrate a sufficient probability that the results of the DNA testing would be exculpatory.

Discussion

WISCONSIN STAT. § 974.07(2) provides that at any time after being convicted a person may move for an order requiring DNA testing of evidence that meets certain conditions, including that "[t]he evidence is relevant to the investigation or prosecution that resulted in the conviction." WIS. STAT. § 974.07(2)(a). A movant who meets the conditions in § 974.07(2) is entitled to DNA testing *at public expense* if the movant meets certain additional conditions, including that, "[i]t is reasonably probable that the movant would not have been prosecuted [or] convicted ... for the offense at issue in the motion under sub. (2), if exculpatory [DNA] testing results had been available before the prosecution [or] conviction ... for the offense." WIS. STAT. § 974.07(7)(a)2. [2]

***2** Hennings argues that the plain language of WIS. STAT. § 974.07(7)(a)2. requires the court to presume that the DNA testing results will be exculpatory and then to assess whether such presumed exculpatory results would lead to a reasonable probability that he would not have been prosecuted or convicted. Hennings also argues that the circuit court's interpretation of § 974.07(7)(a)2., which requires him to show a reasonable probability that the results of the DNA testing will be exculpatory, defies the plain language and the purpose of the statute.

The circuit court observed, "[i]f the meaning of the statute is as plain as grammar suggests, there isn't much more to talk about...." We understand the circuit court to have been suggesting that a grammatically correct interpretation of WIS. STAT. § 974.07(7)(a)2. appears to require a court to presume that the DNA testing results will be exculpatory. This presumption flows from the italicized language in this quote from the statute: "It is reasonably probable that the movant would not have been prosecuted [or] convicted ... *if exculpatory [DNA] testing results had been available.*" (Emphasis added.)

According to the State and the circuit court, Hennings' grammatical reading of WIS. STAT. § 974.07(7)(a)2. leads to absurd results and renders other sections of the statute superfluous. The State argues that the plain language interpretation of § 974.07(7)(a)2. leads to absurd results because:

> If the court must presume to be "exculpatory" any piece of evidence obtained by police from a crime scene that is arguably "relevant to the *investigation or* prosecution" and might have someone's DNA on it, there is no practical limit to mandatory postconviction testing at public expense. Taken literally, this approach would require postconviction DNA testing in every single case where items of evidence that conceivably could contain DNA are recovered from a crime scene.

The State contends that this will "impose an intolerable burden on law enforcement agencies and the State Crime Lab."

Whether or not the State is correct in its prediction that Hennings' interpretation would require testing of all items recovered from a crime scene that could "conceivably" contain DNA evidence, we understand both the State's and the circuit court's concern to be that Hennings' interpretation could not have been intended by the legislature because it would unreasonably burden the already strained resources of the State Crime Laboratory.

Hennings counters that his reading of the statute will not so readily require DNA testing at public expense, because the evidence must still be relevant to the investigation or prosecution that resulted in conviction under WIS. STAT. § 974.07(2)(a). Hennings adds that "presuming favorable results is never alone enough for mandatory testing. The statute still requires an additional showing of a reasonable probability of a different result ." (Emphasis omitted.) Relying on *State v. Hudson*, 2004 WI App 99, ¶¶ 19–21, 273 Wis.2d 707, 681 N.W.2d 316 (finding that the defendant could not demonstrate a reasonable probability that he would not have been prosecuted or convicted even if exculpatory DNA testing results were presumed, "given the overwhelming evidence of his guilt"), Hennings argues that presuming favorable results does not mandate DNA testing at public expense in every case, and that floodgates have not been opened in other states where exculpatory results are presumed.

***3** The State also argues that the plain language interpretation of WIS. STAT. § 974.07(7)(a)2. renders § 974.07(6) and (7)(b) superfluous.[3] According to the State, if exculpatory DNA testing results are presumed, a defendant must merely make the "threshold showing that the evidence to be tested is 'relevant to the investigation or prosecution that resulted in the conviction' " to satisfy the requirements of § 974.07(7)(a). The State contends that nearly all defendants will be able to make this showing, and will therefore be eligible for mandatory DNA testing at public expense. Consequently, no defendants will seek testing at their own expense under § 974.07(6) or at the discretion of the court under § 974.07(7)(b), rendering those portions of the statute superfluous.

Hennings counters that his reading of the statute does not make WIS. STAT. §§ 974.07(6) or 974.07(7)(b) superfluous. A defendant who moves for DNA testing at public expense under § 974.07(7)(a) must in addition to showing that the evidence is relevant, also show that it is reasonably probable that he or she would not have been prosecuted or convicted had exculpatory DNA testing results been available before trial. WIS. STAT. § 974.07(7)(a)2. Again relying on *Hudson*, 273 Wis.2d 707, ¶¶ 19–21, Hennings argues that not every defendant will be able to show that exculpatory DNA testing results would have changed the outcome of the case so that he or she would not have been prosecuted or convicted. Defendants who cannot make that additional showing may therefore have recourse to DNA testing at their own expense under § 974.07(6).

Defendants may also have recourse to WIS. STAT. § 974.07(7)(b), which permits a circuit court in its discretion to order DNA testing at public expense if it is reasonably probable that the results of the testing would lead to a more favorable outcome of the proceedings that led to the conviction. The parties agree that a defendant who can show that the defendant would have benefited in terms of a reduced

charge or a lesser sentence, may seek testing at public expense at the court's discretion under § 974 .07(7)(b). Yet, the State argues that a defendant will never need to resort to § 974.07(7)(b) if the DNA testing is presumed exculpatory under § 974.07(7)(a)2. As the circuit court noted, "if the evidence in the government's possession [must be presumed] exculpatory, who cares if it is mitigatory?"

The circuit court rejected Hennings' "grammatical" construction in favor of an interpretation that the court reasoned "preserves and makes sense of more of the statute." The circuit court based its interpretation in part on an understanding of the term "exculpatory" as embracing the concept of "tending" to exonerate, or likely to be true. Such an understanding, the court reasoned, would preserve the independent meaning of other parts of the statute, from requiring that the court then assess whether the tendency to be exculpatory is sufficient to establish a reasonable probability that the defendant would not have been prosecuted or convicted (under WIS. STAT. § 974.07(7)(a)2.), to directing defendants unable to show any tendency to be exculpatory to the other subsections that allow testing, at private or public expense, under other circumstances (under WIS. STAT. § 974.07(6) and (7)(b)).

***4** The circuit court ultimately grounded its interpretation on the concern that Hennings' "grammatical" interpretation would lead to absurd results, adding to the burden of the already overburdened court system without effectively serving the statute's purpose. The circuit court believed that construing the statute as urged by Hennings would lead to absurd results because it would be too easy for defendants to obtain DNA testing at public expense in cases where there was no reasonable likelihood of there being exculpatory test results. As the court stated:

> The statute applies to any and all evidence "relevant to the investigation or prosecution that resulted in the conviction" that is still in the possession of the government. WIS. STAT. §§ 974 .07(2)(a), (b). Think about how much evidence tends to be collected by the police as they investigate a crime scene, and how much of it ultimately ties any suspect to the crime.
>
> It is often the case that when the police arrive at a crime scene—say, a shooting that appears to have erupted from a robbery or a botched drug deal—they know little of the details of the shooting. So they collect and preserve everything that might help them solve the crime, every item that seems like it might relate to the crime they are investigating. They pick up all kinds of items lying about in the vicinity. They pick up obvious (or seemingly obvious) items such as weapons and shell casings and clothing. And they also pick up personal items that may not have been instrumental in the crime, but nonetheless may link a suspect to the scene, such as cell phones and sunglasses and plastic bags and pipes and bottles and innumerable other items.
>
> Frequently, however, these potential leads do not pan out. The presence of these items at the scene of the crime is merely coincidental. Compare the items listed on the typical police inventory marked as a trial exhibit in a typical shooting case with the items that actually are introduced as evidence. It is common for such inventories to list many more items than ever come into play. Of items that are collected by the police but not introduced at trial, their presence at a crime scene may say much more about the prevalence of other crime in the neighborhood, or of the general state of litter, than about who committed the crime.
>
> But because these items seemed relevant at the outset of the investigation and have found their way into the possession of the police, they are available for DNA testing. And if it is *presumed* that these items contain DNA evidence that exculpates the defendant, then all of these items must be tested. The potential absurdity of this arrangement is not hard to conceive: Consider a case where none of the physical evidence collected by the police at the scene of a shooting turns out to be inculpatory, yet because all of the evidence is "relevant to the investigation," WIS. STAT. § 974.07(2)(a), and all of it is in the possession of the government, WIS. STAT. § 974.07(2)(b), if all of it is presumed exculpatory, as Mr. Hennings contends, then all of it must be tested, at public expense.

***5** We acknowledge that the State's and the circuit court's warnings of unreasonably high numbers of motions for ultimately unfounded DNA testing at public expense are mere assertions, and we cannot discern whether such absurd results will follow from Hennings' construction of the statute. Nevertheless, if the State and circuit court are correct, then the prospect of such a significant statewide impact warrants guidance from the Wisconsin Supreme Court. For the reasons above, we conclude that the dispute over the test to be applied when a defendant seeks DNA testing at public expense is a matter of statewide concern which is in need of prompt and final resolution by the Wisconsin Supreme Court.

All Citations

Not Reported in N.W.2d, 2013 WL 5477367

Footnotes

1 All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

2 WISCONSIN STAT. § 974.07(7)(a)2. is a subdivision of § 974.07(7)(a), which states:

A court in which a motion under sub. (2) is filed shall order forensic [DNA] testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It is reasonably probable that the movant would not have been prosecuted [or] convicted ... for the offense at issue in the motion under sub. (2), if exculpatory [DNA] testing results had been available before the prosecution [or] conviction ... for the offense.

3. The evidence to be tested meets the conditions under sub. (2)(a) to (c).

4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

3 WISCONSIN STAT. § 974.07(6) applies to exchanges of information related to the sharing of evidence containing biological material and of findings related to testing of that material between the district attorney and the movant, and is the provision by which defendants may obtain DNA testing at their own expense. This provision requires only that "the information being disclosed or the material being made available is relevant to the movant's claim." The circuit court found that Hennings satisfied this requirement here.

WISCONSIN STAT. § 974.07(7)(b) authorizes ("may"), but unlike WIS. STAT. § 974.07(7)(a) does not require ("shall"), a circuit court to order DNA testing at public expense if the defendant shows that it is reasonably probable that "the outcome of the proceedings that resulted in the conviction ... would have been more favorable" had DNA testing results been available before the defendant was prosecuted. This provision does not contain the presumption that the DNA testing results be exculpatory, and does not use the term "exculpatory" at all.

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