

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2017AP2288

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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

Plaintiff-Respondent

v.

STEVEN A. AVERY

Defendant-Appellant.

**DEFENDANT-APPELLANT'S REPLY TO THE STATE'S RESPONSE
IN OPPOSITION TO AVERY'S MOTION TO STAY THE APPEAL AND
REMAND THE CAUSE TO THE CIRCUIT COURT**

Now comes Defendant-Appellant, Steven A. Avery, through his attorneys Kathleen T. Zellner and Steven G. Richards, and for his Reply to the State's Response in Opposition to his Motion to Stay the Appeal and Remand the Cause to the circuit court states as follows:

Introduction

The State's response conveys an attitude of impunity for its past actions of withholding exculpatory evidence and its current action of continuing the concealment of its destruction of potentially exculpatory or useful evidence.

When the State disclosed a CD of violent porn from the Dassey-Janda computer 12 years after the CD was created and concealed from prior counsel, the State argued, as it does now, that Mr. Avery was attempting to add new material to his § 974.06 motion. (740:5). This Court did not accept that disingenuous response then, and it should not now accept the State's current disingenuous response which echoes the same argument.

The State wants this Court to overlook the undisputed fact that 2 weeks ago, on December 28, 2018, when it filed its response to Mr. Avery's request for new DNA testing of the bones from the Manitowoc Gravel Pit, it never once admitted or disclosed that it had given the bones back to the Halbach family in 2011 without notice to Mr. Avery or his counsel. (Plaintiff-Respondent's Response in Opposition to the Petition to Stay the Appeal and Remand this Case to the circuit court, December 28, 2018, pp. 1–8). Instead, the State carried on its charade of concealment by claiming that Mr. Avery

could voluntarily dismiss his pending appeal. The State's response specifically stated:

The State notes that Avery has the option to voluntarily dismiss this appeal if he wishes to litigate a Wis. Stat. § 974.07 motion now. If he chooses to do so, and if the circuit court grants DNA testing that produces exculpatory results, it is possible that some, or all, of the issues raised in Avery's Wis. Stat. § 974.06 filings will become moot.

* * *

Alternatively, if Avery is not confident that his Wis. Stat. § 974.07 motion will be successful, or not confident that testing will produce exculpatory results, he should wait and see if he prevails on appeal and then decide if it is necessary to litigate a Wis. Stat. § 974.07 motion. A movant can bring a Wis. Stat. § 974.07 motion at any time after conviction or adjudication.

(12/28/2018 Response, pp. 6–7)

What the State fails to mention in its helpful guidance to Mr. Avery is that it facilitated the destruction in 2011 of the very evidence that Mr. Avery would be hoping to test if he was so foolish as to voluntarily dismiss his current appeal.

The State has not been prejudiced in any way by the delays granted to Mr. Avery as a result of the State's misconduct in withholding and facilitating the destruction of material evidence. The State wants this Court to turn a blind eye to these actions and focus instead on Mr. Avery's actions in seeking a second delay in filing his brief. Given that this case spans 12

years post-trial, the request of an inmate, serving a life sentence without parole, in seeking 2 delays based on recently discovered, suppressed, and destroyed evidence hardly constitutes a threat to the orderly administration of justice in the State of Wisconsin. If Mr. Avery waited to raise this current claim until after his appeal was concluded, the State would undoubtedly argue that he had failed to show a sufficient reason for not raising the issue sooner.

As a result of the State's actions in concealing and withholding the Dassey-Janda CD and concealing the return of bones to the Halbach family, Mr. Avery has been forced to delay his appeal and therefore his quest for a new trial and eventual freedom.

I. Mr. Avery's motions are not dilatory.

The State, in its response to Mr. Avery's motion to stay the appeal and remand the cause, suggests that Mr. Avery's motions to remand for further proceedings are intended to "perpetual[ly] delay . . . this appeal." (St. Mot. at 9). This suggestion is belied by the record. Including the instant motion, Mr. Avery has pursued two motions to stay the appeal and remand for further proceedings and one motion to supplement the record, on which this Court ordered proceedings in the circuit court. Mr. Avery maintains that each of these motions raised meritorious claims for relief based upon issues relating to his original § 974.06 motion and supplements.

Indeed, Mr. Avery has not filed these motions to delay this Court or unduly postpone his appeal; instead, Mr. Avery has filed his motions to apprise this Court of ongoing due process and discovery violations that—only after months of litigating Mr. Avery’s postconviction motion and its appeal—have recently been discovered. These motions are not intended for delay.

II. This motion for stay and remand is analogous to Mr. Avery’s previous motion to supplement the record in connection with an alleged due process violation.

Mr. Avery has previously moved this Court for a remand to the circuit court to litigate motions to supplement the record with a previously-withheld CD containing unique violent pornography search material from the Dassey computer. (5/15/2018 Defendant-Appellant’s Motion to Supplement the Record on Appeal). In that motion, Mr. Avery asked this Court for leave to supplement his § 974.06 motion with the content of a CD containing the results of a forensic examination of the Dassey computer; neither the CD nor its contents had ever been produced to Mr. Avery or his defense team at any stage of his criminal proceedings.

In that instance, this Court retained jurisdiction but remanded the case to the circuit court for Mr. Avery to file a supplemental postconviction motion. (6/7/2018 Appellate Court order at 2). Because Mr. Avery’s

allegations relate to issues already raised in the underlying record (see Issue III, *infra*) the same outcome is appropriate here.

III. Because this Court originally remanded for scientific testing so that test results could be included in Mr. Avery's § 974.06 motion, the State was on notice that Mr. Avery intended to test the suspected human pelvic bones recovered from the Manitowoc County Gravel Pit.

Mr. Avery's 2015 appeal concluded on September 8, 2016, when this Court remanded the case to the circuit court for postconviction scientific testing of evidence. (580:1–2). Among the evidence Mr. Avery asked the circuit court to test were the suspected human pelvic bones collected in the Manitowoc County Gravel Pit under Calumet County property number 8675. (573:23). Therefore, the State has been on notice that Mr. Avery wished to obtain the Manitowoc County Gravel Pit bones for several years. The State fails to acknowledge that Mr. Avery is appealing the circuit court's error in abusing its discretion in denying Mr. Avery's motion to vacate its October 3, 2017, order and allowing additional scientific testing. (628:1–6).

Moreover, the Manitowoc County Gravel Pit bones were a subject of the September 18, 2017, agreement wherein the parties agreed to further scientific testing. (629:2). Thus, the State's claim that the instant motion is devoid of foundation in the record is specious; Mr. Avery has been petitioning the circuit court for testing of the Manitowoc County Gravel Pit bones for

years. With such a foundation in the record on appeal, the State's response in opposition to Mr. Avery's motion should be denied.

IV. The State should not benefit from concealing a report, failing to give notice, and facilitating the destruction of biological evidence.

The State's opposition to Mr. Avery's motion is tantamount to asking this Court to sanction a rule where "prosecutor may hide, defendant must seek." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Such a rule "is not tenable in a system constitutionally bound to accord defendants due process." *Id.*

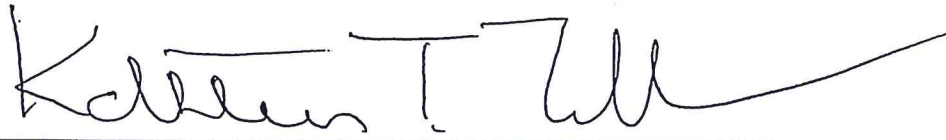
After all, the State, in its response to Mr. Avery's motion, makes no effort to deny the due process violations Mr. Avery alleges, i.e., that the State concealed a police report, failed to give statutorily-mandated notice to Mr. Avery and his attorneys of its intent to destroy biological evidence, then facilitated the destruction of the same evidence. The State should not now reap the benefit of its past statutory and due process violations. Such an outcome would contravene the sense of basic fairness inherent in our justice system.

V. Conclusion

Wherefore, undersigned counsel respectfully requests that this Court enter an order staying this appeal and remanding the cause to the circuit court for proceedings to determine whether the State has violated Wis. Stat. § 968.205 and *Youngblood v. Arizona*.

Dated this 1st day of February, 2019.

Respectfully Submitted,



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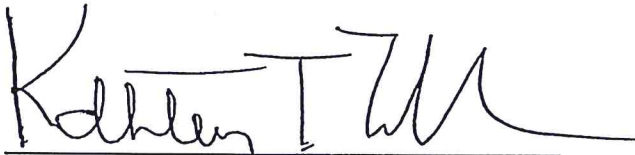
CERTIFICATE OF SERVICE

I certify that on February 1st, 2019, a true and correct copy of Defendant-Appellant's Reply to State's Response to Motion to Stay Appeal and Remand the Cause for Proceedings on Claims for Relief in Connection with the State's Violation of Wisconsin Statute § 968.205 and Youngblood -v- Arizona, was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

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