BY THE COURT

Angela W. Sutkiewicz
Circuit Court Judge

Date 8/8/19

STATE OF WISCONSIN	CIRCUIT COURT	MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

STEVEN A. AVERY,

Defendant.

DECISION AND ORDER

Case No. 05 CF 381

This case was remanded to this court for consideration of claims made by the defendant for relief from what he asserts was the State's violation of Wis. Stats. § 968.205 and the subsequent violation of his constitutional rights pursuant to the ruling in *Youngblood v. Arizona*, 488 U.S. 51 (1988). A prior motion to the Court of Appeals was denied.

The defendant alleges that on January 24, 2019, his current postconviction counsel received a previously undisclosed police report. The report, dated September 20, 2011, was written by Deputy Jeremy Hawkins of the Calumet County Sheriff's Department. The defendant further alleges that his counsel received a previously undisclosed ledger sheet, on or about the same date, that identified the material that was the subject of Deputy Hawkins's report.

The report of Deputy Hawkins indicates that he, Sergeant Investigator Mark Wiegert, Attorney Thomas Fallon and Attorney Norman Gahn removed materials, stored in evidence, and released them to the Halbach family. The officers and attorneys identified which tagged items of evidence were alleged to contain human bone or possible human bone fragments. In order to accomplish this task, the parties used a report of Dr. Leslie Eisenberg, the forensic anthropologist called as a witness by the prosecution in this matter. Deputy Hawkins used Dr. Eisenberg's report to identify evidence identified as having come from the Gravel Pit, (southwest) of the Avery property, in deciding which materials were to be returned to the Halbach family.

The defendant alleges that the State violated the preservation of evidence statute, Wis. Stats. § 968.205, which requires law enforcement agencies to retain evidence as long as a convicted individual is in custody or until his or her mandatory release date.

Additionally, the defendant asserts that his constitutional rights were violated when he was deprived of the opportunity to have the alleged human remains tested. If such a test proved that the material marked with the designated evidence tags were human remains and could be identified as those of the victim, the defendant asserts that it would establish that the evidence that led to his conviction was planted by the real killer in this crime.

On January 24, 2019, the defendant filed a motion with the Court of Appeals requesting that the appeal in this matter be stayed and remanded to the circuit court to review the circumstances regarding the withholding of the records and the release of the evidentiary materials to the Halbach family. Additional documents were filed by both the State and the defense regarding this motion. On February 25, 2019, the Court of Appeals granted the motion to remand these issues to the circuit court for consideration and decision on the issues; that decision will then be permitted to be included in the continued primary appeal before the Court of Appeals.

The Court of Appeals was clear that this supplemental motion was restricted to reviewing whether the State violated Wis. Stats. § 968.205 and how such a violation would affect the constitutional rights of the defendant. As such, the court will limit its review to these issues alone. As the defendant stated in his brief, "[M]r. Avery is not stating a sufficiency of evidence or ineffective assistance of counsel claim relating to inadequate testing of bone fragments. Rather, Mr. Avery's claims pertain to the constitutional violation stemming from the State's destruction of the human bone fragment evidence. The retesting of the bones is relevant to this constitutional claim on the matter of the exculpatory nature of the destroyed evidence; however, the retesting of the bone fragments is not a claim in its own right."

However, before the court addresses the primary issue, it feels compelled to address the recusal motion brought by the defendant. It is apparent from the record that there are no grounds upon which to grant that relief. The civil case referred to by the defendant, in which he was named as a party, was judicially reassigned to this court, but the case was immediately stayed pending the resolution of the defendant's criminal appeal. Before any proceedings were conducted by this court, the matter was voluntarily dismissed. The court neither examined any evidence nor issued any rulings in the civil case, other than to grant the motion for voluntary dismissal. The administrative assignment of the defendant's civil case to this court does not form the grounds for a recusal in this action.

As further evidence in support of the request for recusal, the defendant argues that this judge served on the Crime Victims Rights Board, along with District Attorney Kratz, during the time that the original trial in this matter was being heard. The defendant asserts that by being on the same volunteer committee with the prosecutor at the time of trial, the judge in this matter must recuse herself. The defendant relies on SCR 60.04(4)(c) for this proposition. However, that provision of the Judicial Code applies to judges who have practiced law with attorneys involved in matters before the court. This judge never practiced law or participated as co-counsel with Attorney Kratz on the defendant's criminal trial or in any other matter. At the time in question, this judge was not serving on the bench and was a citizen member of the Crime Victims Rights Board. The fact that Attorney Kratz was on the same voluntary, public board at the same time as

this judge cannot be defined as the practice of law. The defendant has offered no grounds upon which the court should recuse itself.

Further, the court must comment on the defendant's objection to the State's response brief. In another motion before the court, submitted April 11, 2019, the defendant asks for leave to file a supplemental response brief in this matter or, in the alternative, to strike the State's response brief as being unauthorized under the remand order of the Court of Appeals. The Court of Appeals states in its order that this court shall conduct any proceedings necessary to address claims in the supplemental motion submitted by the defendant. The order acknowledges the defendant's position on this matter and determines that the best course of action is to have this issue developed and litigated while the matter is still relatively fresh and not *procedurally barred. The defendant echoes this argument in his filings, asserting that his* motion should not be procedurally barred and that all claims raised by this motion should be heard by the circuit court. Both parties have filed briefs in this matter and all arguments will be considered.

Regarding the issue at hand, this court has been charged with determining whether Wis. Stats. § 968.205 has been violated by the State during the post-conviction period and whether any such violation of the statute deprived the defendant of the rights provided to him via the ruling in *Youngblood v. Arizona, supra.* Both parties submit numerous arguments and allegations in their briefs; however, the court will address only those arguments that focus on the charge given to it by the Court of Appeals.

Wis. Stats. § 968.205(2) states:

> Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any

> 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* that was the subject of the criminal investigation or may be *reasonably used to incriminate or exculpate* any person for 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 or her discharge date.

(Emphasis added).

The first clause of the statute does not apply to this matter. None of the material returned to the Halbach family was scientifically identified as the physical remains of Teresa Halbach. No DNA testing was performed on material returned to the family that conclusively identified the material as belonging to a human being or any specific individual. Indeed, at the time of trial, the FBI Crime Lab indicated that DNA testing could not be done on the evidence submitted, precluding identification of the remains as being those of the victim. Without such identification, the evidence in question cannot, within the plain language of the statute, be identified as biological material from the victim of the offense at issue in this case.

However, this does not end the inquiry into this matter. The second clause of the statute may apply in the case before the court. The defense argues that the evidentiary material returned to the Halbach family might reasonably have been used to exculpate Mr. Avery or establish that biological evidence was planted on his property to incriminate the defendant in this matter.

The defense argues that the evidence recovered from the Quarry site may have proved that the victim was not killed on the Avery property, as argued by the prosecutor, and that the evidence found on the grounds of Avery Salvage were planted there by the

real offender in this matter to incriminate Mr. Avery. Because that evidence is no longer available to the defense for testing, the defense argues that it can no longer use the material to exculpate Mr. Avery of this offense. Furthermore, the defense argues that the State further violated the statute by not providing the required notice to the defendant or his counsel prior to disposing of the evidence, preventing the defendant from exercising his opportunity to object to its release or destruction.

Wis. Stats. § 968.205 (3) provides that a law enforcement agency may destroy evidence covered by the statute before the time specified in sub. (2) only if all of the following applies:

> (a) The law enforcement agency sends a notice of its intent to destroy the evidence to all persons who remain in custody as a result of the criminal conviction…and to either the attorney of record for each person in custody or the state public defender.

Subsection (4) of the statute provides what shall be included in such notice:

> A notice provided under sub. (3)(a) shall clearly inform the recipient that the evidence will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the evidence is filed under s. 974.02(2) or a written request for the retention of the evidence is submitted to the law enforcement agency.

There is no dispute that the evidence in question was released to the Halbach family without the statutorily required notice under subsections (2) and (4) being provided to the defendant or the defense attorney of record in this case. However, the inquiry into the matter is not terminated with this issue. In order for the statute to apply, the evidence in question must reasonably be used to incriminate or exculpate a defendant for the offense.

The ruling in *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994), incorporated both of the tests cited by the defendant outlining the constitutional requirements of the State's responsibility to preserve evidence, as set forth in *California v. Trombetta*, 467 U.S. 479 (1984) and *Youngblood v. Arizona*, 488 U.S. 51 (1988). The State's failure to preserve evidence violates a defendant's due process rights if law enforcement: (1) failed to preserve evidence that is apparently exculpatory, or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory. *Greenwold, supra.* at 67. The defense is correct in asserting that Wisconsin courts have applied the reasoning in these cases to the post-conviction destruction of evidence. *State v. Parker*, 2002 WI App 159, 256 Wis. 2d 154, 647 N.W.2d 430.

In order to establish that the evidence in question was apparently exculpatory, a defendant must demonstrate that the evidence possessed exculpatory value that was apparent to those who had custody of the evidence before it was destroyed. *State v. Oinas*, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct.App. 1985). It is not enough to simply allege that destroyed evidence had the possibility of being exculpatory. *Id.* Evidence does not have apparent exculpatory value if analysis of the evidence would have provided an avenue of investigation that might have led in any number of directions. *Youngblood, supra.* at 57.

The defendant argues that the evidence returned to the Halbach family contained human remains that, if tested under currently available DNA testing, specifically ANDE Rapid DNA analysis, could be conclusive in identifying the remains as belonging to the victim, Teresa Halbach. However, it must be noted that defendant begins his argument

with the conclusion that the evidence turned over to the Halbach Family were, in fact, human remains.

The defendant points to several portions of the record where the evidence that was collected from the Quarry site was listed in police documents or reports as human remains. The defendant specifically cites the police report of Deputy Hawkins, dated September 20, 2011, in support of his claim. (Defendant's Exhibit 13). In that document, Deputy Hawkins writes that he, Sgt. Inv. Mark Wiegert, Attorney Thomas Fallon and Attorney Gahn, removed evidence with property tag numbers that were listed as having contained human bones. They determined which of the evidence samples contained human bone by using a report authored by Dr. Leslie Eisenberg. Dr. Eisenberg was the forensic anthropologist called as an expert witness by the prosecution to identify the evidence collected from various locations during the investigation of this case. The record in this case contains more than one document created by Dr. Eisenberg and the report written by Deputy Hawkins doesn't identify the specific document used by the parties on that date.

In her final report submitted to District Attorney Kratz on December 6, 2006, Dr. Eisenberg set forth her conclusions identifying which evidence supplied for analysis contained human bone fragments and what was identified as material other than human in origin. On February 28, 2007 and March 1, 2007, Dr. Eisenberg testified at the defendant's trial. She was questioned extensively by both Prosecutor Fallon and Attorney Strang regarding her conclusions in that final report.

On March 1, 2007, Attorney Strang cross-examined Dr. Eisenberg. Attorney Strang questioned the doctor about material discovered in the investigative area referred

to as the Quarry in investigative reports. During his cross-examination, Attorney Strang asked the doctor about two fragments of material that appeared to be pelvic bone. However, Dr. Eisenberg testified that she was not able to conclude, with scientific certainty, that the fragments were pelvic bone or that they were human in origin.

After questioning the doctor about other aspects of the opinions in her report, Attorney Strang returned to the evidentiary material found in the Quarry. Dr. Eisenberg testified that, at the time of writing her report in December of 2006, she could identify that eight of the fragments were burned and one of the fragments was definitely not human. She qualified that her opinion on the material was, at that point of her analysis, as much as she knew about the identifications at that point in time. In continued cross-examination, Dr. Eisenberg once again confirmed that the Quarry area contained suspected, possibly human bones. (Tr. 3/1/2007, at pg. 40, 6-7)

Attorney Fallon conducted a redirect examination. Attorney Fallon asked Dr. Eisenberg to clarify her opinion on the nature of the fragments found in the gravel pit at the Quarry southwest of the Avery property. Attorney Fallon asked if, in her original analysis, the doctor was only able to determine that one fragment of the material recovered from the Quarry was non-human; Dr. Eisenberg confirmed that. He then asked if, in subsequent review and analysis, the doctor had determined that several more of the fragments were non-human. Dr. Eisenberg responded that of all of the fragments, only three were identifiable as being possibly human in origin. Responding to a question from Attorney Fallon, the doctor confirmed that she could not, to a reasonable degree of anthropological or scientific certainty, identify any of the fragments as human bone.

On cross-examination, Dr. Eisenberg stated that the material from the Quarry location did, in fact, contain non-human bone that was intact. The doctor confirmed that burned bone fragments could be found at all three sites where evidentiary material was found; however, she could not confirm, with any degree of scientific certainty, that any of the bones from the Quarry were human in origin.

As previously stated, pursuant to the ruling in *Greenwold*, *supra.*, for evidence to be "apparently exculpatory" to law enforcement, the defendant must demonstrate that the evidence possessed exculpatory value apparent to those who had custody of the evidence before it was destroyed. In this case, the defendant cannot meet his burden.

While the defendant points to the report of Deputy Hawkins which indicates that human bones taken from the Quarry were returned to the Halbach family, the statement of the deputy does not transform the physical material from what it is into what he declares it to be on the form. Dr. Eisenberg testified at trial that the evidence taken from the Quarry could not be identified as human remains. The FBI could not test the bones to determine if the fragments were human remains, or if so, to whom the bones belonged.

Nothing of record indicates that in 2011, when the material was given to the Halbach family, the material was re-classified as human bone. The law enforcement officers and attorneys involved in the release of the evidence used a prior written report of Dr. Eisenberg, written before her testimony under oath, to select what material would be given to the Halbach family. Dr. Eisenberg clarified her opinion in her trial testimony and confirmed that none of the material found in the Quarry could be identified as human bone fragments. Furthermore, the FBI confirmed that the fragments could not be tested for DNA to confirm whether the fragments were human or identified as those of the

victim. Under those circumstances, it cannot be said that the materials released from evidence would have been apparently exculpatory to anyone. There was no scientific evidence or record, at the time that the material was released, to support that human biological material was being released or that the material was known to be the remains of the victim.

The defense argues that it would be absurd for the State to release the bone fragments to the Halbach family if it didn't believe that the material released was the remains of the victim. Therefore, the defendant argues, the State acknowledged that the material released was apparently exculpatory. However, even if law enforcement believed that the material was human bone, their belief would not be founded in science or any final evidence produced during the investigation or trial; they would be acting on an unfounded belief, rather than the *reasonable* belief as required by the *Greenwold* test. Individual belief does not transmute one form of matter into another. Nothing supports the position that the materials released were apparently exculpatory.

Even if the defendant cannot meet the burden that the material released was apparently exculpatory, the defendant may meet the constitutional test for a violation of his rights under *Greenwold* if he can establish that the State acted in bad faith by failing to preserve evidence that is potentially exculpatory. To establish bad faith, the defendant must show that law enforcement was aware of the potentially exculpatory value of the evidence that they failed to preserve and acted with either official animus or a conscious attempt to suppress evidence.

In this matter, the defendant cannot show that the State knew of the potential exculpatory value of the evidence. As stated above, Dr. Eisenberg testified that the

remains could not be identified as being of human origin and the FBI confirmed that evidence could not be tested to confirm whether the material was from a human being or that they were the remains of the victim.

Dr. Eisenberg also testified that the material found in the Quarry, tagged as Number 8675, was largely unburned. (Tr. 3/1/2007, pg. 47) This does not support the defendant's argument that the victim was murdered and burned in a place other than the Avery property and placed there at a later date. Given the testimony of Dr. Eisenberg and the lack of any evidence supporting the released material being human in origin, it cannot be said that law enforcement was aware of any potentially exculpatory value of the material that they did not preserve and that they were making a conscious attempt to suppress evidence favorable to the defendant.

Based on the foregoing, the court finds that the defendant has failed to meet his burden to establish that Wis. Stats. § 968.205 was violated or his constitutional rights were violated under the provisions of *Youngblood v. Arizona*, *supra*. As such, the defendant's motion is denied.