ORIGINAL

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

State of Wisconsin,

Plaintiff,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
MAR 10 2006
CLERK OF CIRCUIT COURT

Vs.

Case No. 2005-CF-381

Steven A. Avery,

Defendant.

State's Response to Defendant's Motion to Assure Fair Forensic Testing

The State moves the court to deny defendant's request to permit defense observation of all scientific or forensic testing and to require the State to make video recordings of such testing. The defendant makes his motion pursuant to sections 165.79(1) and 971.23, Wis. Stats., as well as upon constitutional grounds pertaining to due process and the Fourth Amendment. However, the defendant cites no authority for his position. The State is unable to address those issues because the defendant has failed to lay out exactly how his request is authorized by state statute or case precedent.

As grounds for his motion, the defendant basically claims that Manitowoc County officials are biased against him and that, therefore, he needs to observe forensic testing of evidence. The defendant's perception of bias on the part of Manitowoc County is irrelevant because Manitowoc County is not conducting any of the forensic testing of evidence. The forensic testing will take place at the Wisconsin State Crime Laboratory in Madison, Wisconsin. The defendant at paragraph 8, page 3, of his motion states that "... all have an interest in assuring that the handling of this case exceeds the normal standards, and that its fairness is beyond reproach or question." What are the normal standards that the defendant is referring to? Why does Mr. Avery's case deserve to exceed normal standards, whatever they are? The State maintains that the Wisconsin State Crime Laboratory applies exceptionally high, strict and stringent standards in all forensic testing and applies them to all criminal defendants equally. The State finds it astonishing that Mr. Avery wants to baby-sit and look over the shoulder of the same crime lab analyst who exonerated him a few years ago of a crime he did not commit. This Madison crime lab analyst will use the same procedures, protocols, quality control and quality assurance guidelines, and required national standards in the analysis of the present evidence that were used when her DNA analysis freed Mr. Avery from prison.

The State opposes the defendant's motion for the following reasons:

1. The Wisconsin State Crime Laboratory is an accredited laboratory having received accreditation from ASCLD/LAB. This organization is an international accrediting body that requires government laboratories to follow specific criteria

developed from the National DNA Advisory Board (DAB) which created a set of federal quality standards for forensic laboratories. The DAB is a congressionally mandated organization that was created and funded by the United States Congress DNA Identification Act of 1994. The DAB created strict standards for crime laboratories in organization and management of the crime lab, personnel, facilities, evidence control, validation, analytical procedures, equipment calibration and maintenance, reports, review, proficiency testing, corrective action, audits and safety. Allowing outside viewers to the testing process is contrary to the State Crime Lab's adherence to the strict controls necessary for accreditation. Two of the most distinguishing features for a forensic laboratory are the requirement for security and the requirement to reduce the risk of contamination during the testing process. Section 6 of the DNA Advisory Board Quality Assurance Standards states that "The laboratory shall have a facility that is designed to provide adequate security and minimize contamination. The laboratory shall ensure that: Access to the laboratory is controlled and limited." The sensitivity of the DNA testing process necessitates constant vigilance on the part of the laboratory staff to ensure the security of the evidence and that contamination does not affect DNA typing results. In order to aid discovery of laboratory contamination, all analysts in the Madison Crime lab are genotyped in order to have a record of possible contaminating DNA profiles, often referred to as a staff elimination database. Allowing viewers to the testing process or persons videotaping the process would place a huge burden on the crime lab and be detrimental to the accreditation process. If all defense viewers were allowed access to the testing process, the crime lab simply could not type them all for reference. This, of course, assumes that all viewers would agree to being genotyped and put into a database. Also, defense attorneys would have a most fertile area for cross-examination of crime lab analysts in security, chain of custody, contamination, and laboratory integrity if access were not controlled and limited. Any scientific test which results in information that may lead to the loss of liberty for an individual accused of a crime needs to be performed with utmost care and every precaution against contaminating test results must be taken. A few shed skin cells or just a cough may needlessly put testing results in question. But most importantly, allowing viewers to be present during the testing process could very well jeopardize accreditation for the Wisconsin State Crime Laboratory. Also, in 1996 the National Research Council (NRC) Committee on DNA Technology made recommendations through publication of *The Evaluation of Forensic DNA Evidence* (National Academy Press, Washington, D.C., 1996). One of the recommendations to improve laboratory performance was made at recommendation 3.1: Laboratories should adhere to high quality standards (such as those defined by TWGDAM and the DNA Advisory Board) and make every effort to be accredited for DNA work (by such organizations as ASCLD/LAB). Again, allowing viewers to the testing process would certainly jeopardize the State Crime Lab's efforts to maintain accreditation.

2. Furthermore, the defendant's concerns over evidence handling and quality testing may be addressed far more effectively through independent DNA testing.

The National Research Council (NRC) endorsed duplicate DNA testing stating that "[a] wrongly accused person's best insurance against the possibility of being falsely incriminated is the opportunity to have the testing repeated.....A defendant who believes that the match is spurious should welcome the opportunity for an independent repeat test." (NRC) Report, Pg 87, Retesting. The National Research Council also stated that the "[t]he best protection that an innocent suspect has against an error that could lead to a false conviction is the opportunity for an independent retest. Id. at pg 88.The defendant's money would be better spent in this area The State encourages the defendant to consider independent DNA testing. In his brief, the defendant refers to a search for the truth. The State agrees with the defendant and believes that a search for the truth would go a long way with independent DNA testing. Hopefully, the defendant would share those results with the State in the defendant's search for the truth. The State would only require the defendant to identify the expert and lab conducting the re-typing, their qualifications and accreditation, and the nature of the proposed typing or analysis. Obviously, the State would ask the court to impose appropriate safeguards on any defense retyping, including a demonstration by the proposed laboratory of compliance with standards and laboratory accreditation at least equal to that of the Wisconsin State Crime Laboratory.

3. The few courts around the country that have addressed this issue have rendered unfavorable decisions for the defendant. In People v. Monagas, 161 Misc.2nd 898, 615 N.Y.S.2nd 633 (1994), the defendant moved for an order permitting a representative to be present at the facility where the DNA testing was to occur. The State opposed the motion on both legal and practical grounds. The New York court denied the defendant's motion stating "[t]he defendant has provided no legal precedent in support of his application. In fact, the law is otherwise. '[N]o principle...in the absence of fraud or bad faith, imposes any duty on the part of the prosecution to invite an accused to participate in its investigatory and trial preparation procedures. Due process of law does not reach that far.' " Id at 634. (Citations omitted). The court also denied the motion on a practical level holding "[t]he laboratory [FBI] operates under a strict security system which precludes the presence of outsiders without clearance, and any breach of that security would compromise the laboratory's effectiveness with respect to hundreds of cases. The entire testing process will take three to four months, so that the presence of the defendant's representative would involve logistical as well as security problems." Id. Likewise, the testing process utilized by the Madison Crime Lab is not a linear or step-by-step process. The testing procedures take considerable time and the presence of viewers would create logistical and security nightmares for the crime lab. In State v. Fields, 196 Ariz. 580, 2 P.3rd 670 (Ct.App.1999), the defendants were charged with homicide while driving under the influence and their blood samples were analyzed at the Crime Lab by gas chromatography. The defendants, after the testing was completed, requested access to the Crime Lab to inspect and videotape. One of the arguments against the request made by the state was that such an order would open "the door to a flood of similar defense requests to access and occupy the

Crime Lab any time forensic evidence is involved in a criminal prosecution." Id. at 672. The Arizona Appellate Court found that "…nothing in the record before us establishes the Defendants' 'substantial need' to observe and record the Crime Lab's current operations." Id. at 673. The court went on to state that "[t]he defendants have provided no evidence, expert or otherwise, that inspecting and videotaping will be more productive than interviews and documents in analyzing the critiquing the Crime Lab's methods." Id. Interestingly, the court noted that "….none of the defendants has challenged the accuracy of the Crime Lab's test results through independent testing of the blood samples each was apparently offered or provided, although this would be the best evidence of the only material issue, the accuracy of the reported BAC.''Id. The court ended its analysis of the issue by correctly stating that "…the defendants' motion to inspect the Crime Lab can only be viewed as an attempted 'fishing expedition,' which the rules do not permit." Id. In State v. Nguyen, 251 Kan.69, 883 P.2nd 937 (Kan, 1992), the court held that "[i]n the absence of fraud or bad faith on the part of the State and its investigative agents, due process does not require the State to invite the the accused to participate in or to supervise testing procedures performed in the investigation of a crime, even if the amount of evidence remaining after the State's testing is so small the defendant will be unable to conduct an independent analysis of the evidence." Id. at 939. The court also held that "[t]he defendant's due process rights are protected by the opportunity to challenge the credibility of the State's expert and the validity of the testing procedures used through cross examination or expert testimony." Id.

The State has addressed defendant's motion in the context of DNA testing. The State submits that the rationale in its response brief should apply to any forensic testing conducted at the State Crime Laboratory.

For the above stated reasons, the State urges this court to deny the defendant's motion to be present at the crime lab for forensic testing or to have the State videotape any testing procedures.

Dated at Chilton, Wisconsin, this 9th day of March, 2006.

Respectfully submitted,

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