ORIGINAL

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
APR 3 2006
CLERK OF CIRCUIT COURT

v.

STEVEN A. AVERY,

Defendant.

Case No.: 05-CF-381
Judge: Patrick L. Willis

STATE'S MEMORANDUM SUPPORTING ADDITIONAL COUNTS IN THE AMENDED INFORMATION

I. INTRODUCTION

The state asks leave of the court to file an Amended Information adding the additional charges of First-Degree Sexual Assault, Kidnapping, and False Imprisonment. The state seeks leave of the court to amend the Information with the additional charges on the theory that these charges are "not wholly unrelated" to the original charges of First-Degree Intentional Homicide and Mutilating a Corpse, which were the subject of preliminary examination. Steven Avery first sought dismissal of the additional charges found in the Amended Complaints on file.[1] Avery now seeks a second preliminary examination based on the fact that those charges were not part of the initial complaint or testimony at the preliminary examination.

[1]The court denied this request in a ruling issued after oral argument on March 17, 2006.

II. PROCEDURAL HISTORY

A Criminal Complaint was filed and an Initial Appearance held on November 15, 2005. Avery was charged with first-degree intentional homicide, mutilating a corpse and possession of firearm by a felon. A preliminary examination occurred on December 6, 2005, and he was bound over for trial. The Information was filed with the court charging the same three counts. Not guilty pleas were entered at Arraignment on January 17, 2006.

In March 2006, the state obtained additional information revealing the involvement of a co-defendant; and which supports the three additional charges of first-degree sexual assault, kidnapping, and false imprisonment. The state requested leave of the court to file an Amended Information adding these counts.

III. ARGUMENT

WITH LEAVE OF THE COURT, THE STATE MAY AMEND THE INFORMATION AND CHARGE THE ADDITIONAL COUNTS OF SEXUAL ASSAULT, FALSE IMPRISONMENT, AND KIDNAPPING BECAUSE THEY ARE *NOT WHOLLY UNRELATED* TO THE ORIGINAL CHARGES OF FIRST-DEGREE INTENTIONAL HOMICIDE AND MUTILATION OF A CORPSE.

Avery argues that the new charges are wholly unrelated to the charges for which he was bound over because there was no testimony adduced at the preliminary examination in support of these charges. Avery frames the question as follows: ". . . . whether Wisconsin's 'wholly unrelated' standard for charges in an Information applies to the abstract events or transaction at issue, or instead to the transaction as embraced within

the evidence at the preliminary hearing" (Avery Brief, at 1). Avery argues that it is the latter; *i.e.* new charges must not be "wholly unrelated" to the evidence adduced at the preliminary hearing. *Id.* Avery has misconstrued the law regarding preliminary examination with respect to the *not wholly unrelated* test. It appears Avery seeks to employ a *sufficiency of the evidence* analysis within the framework of the not wholly unrelated test. This is not, and should not be the law. In fact, this argument has been made and rejected by the courts. *State v. Burke*, 153 Wis. 2d 445, 457, 451 N.W.2d 739 (1990).

Prosecutors in Wisconsin are afforded broad discretion in determining whether to initiate criminal proceedings against a defendant. *State v. Hooper*, 101 Wis. 2d 517, 532, 305 N.W.2d 110 (1981). Still, a prosecutor's discretion is not without bounds, and may be limited by the legislature. *State v. Burke*, 153 Wis. 2d at 451. Relevant to this case is Wis. Stat. § 971.01(1), which provides:

> **Filing of the information. (1)** The district attorney shall examine all facts and circumstances *connected* with any preliminary examination *touching* the *commission of any crime* if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information *according to the evidence on such examination* subscribing his or her name thereto.

In *Burke*, the supreme court addressed the issue of whether the language "according to the evidence on such examination" in Wis. Stat. § 971.01(1) requires that direct evidence relating to any additional counts be presented at the preliminary examination. *State v. Burke,* 153 Wis. 2d at 451-55. Noting that prior supreme court cases have often addressed this statute, *Burke* held that in a "multiple-offense" transaction case, "once the defendant has been bound over for trial on at least one count

relating to the transaction, the prosecutor may in the information charge additional counts not wholly unrelated." *Id.* at 453. This is true "irrespective of whether direct evidence concerning the charges had been produced at the preliminary examination." *Id.* at 457.

Thus, rather than focusing on whether the preliminary hearing itself discloses direct evidence of the additional crime, a prosecutor must determine whether the additional charges are related to the charges discussed at the preliminary hearing "'in terms of parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent.'" *State v. Burke*, 153 Wis. 2d at 453 (quoting *Bailey v. State*, 65 Wis. 2d 331, 341, 222 N.W.2d 871 (1974)). The seven-factor analysis of *Bailey* and *Burke* forms a "general framework for determining whether counts can be added to the information and yet meet the goals of the preliminary hearing." *State v. Richer*, 174 Wis. 2d 231, 239-42, 496 N.W.2d 66 (1993) and *State v. Bury*, 2001 WI App 37, 241 Wis. 2d 261, 624 N.W.2d 395.

In *State v. Williams*, 198 Wis. 2d 479, 490, 544 N.W.2d 400 (1996), the supreme court outlined the role of the judicial branch as follows:

> A circuit court judge's sole obligation, at the preliminary hearing, is to determine whether there is probable cause that some felony has been committed by the defendant. *See id. See also Bailey v. State,* 65 Wis. 2d 331, 341, 222 N.W.2d 871, 876 (1974). Once the circuit court does this for each count in a complaint, it is then the responsibility of the district attorney to prepare the information, subject only to an abuse of discretion review under the "transactionally related" standard of *Richer. See Burke*, 153 Wis. 2d at 456.

(Footnote omitted.)

Wisconsin Supreme Court decisions expanding the authority of the district attorney to include any counts that exhibit such a "transactional nexus" are "indicative of

this court's continuing efforts to further the underlying legislative and constitutional goals of the preliminary hearing while also affording prosecutors increasing flexibility in their charging decisions." *State v. Richer*, 174 Wis. 2d at 246. These purposes, which include the prevention of hasty or malicious prosecutions, are met if "all charges included in the information . . . [are] . . . transactionally related to charges which are themselves supported by evidence adduced at the preliminary hearing." *Id.* at 247. In other words, this test is met if the counts included in the information are not "wholly unrelated" to those for which the defendant is bound over. *See id.* at 238. *See also State v. Williams*, 198 Wis. 2d at 489.

For example, in *Burke* the prosecutor filed an Information containing four counts of sexual assault that had not directly been addressed during the preliminary hearing. Nevertheless, the court concluded that the charges were not "wholly unrelated" because of their close nexus or transactional relationship to the charge on which the testimony had been taken. All of the counts involved acts of sexual assault that occurred between the same parties in a confined space and virtually without interruption. Although the assault occurred over the course of a few hours, the court found that the defendant engaged in a single ongoing episode of sexual assault. *State v. Burke,* 153 Wis. 2d at 457-58. Thus, the court held that the addition of the four counts of sexual assault was a proper exercise of prosecutorial discretion. *Id.*

In *Richer*, the supreme court elaborated that, in order to pass the wholly unrelated test, "counts contained in the information must *flow from the same transaction for which evidence has been introduced at the preliminary hearing." State v. Richer,* 174 Wis. 2d at

247 (emphasis added). Clearly, these additional charges flow from the same transaction for which evidence was introduced at the preliminary hearing.

In the case at bar, the parties to the original charges and the new charges are identical. The witnesses are identical. The geographical proximity and time of offenses are identical in that all offenses are alleged to have occurred at the Avery compound on the afternoon of October 31, 2005. Similarly, the circumstantial facts and the physical evidence needed to prove the charges are the same. Lastly and of equal importance, the sexual assault provides the motive and intent for the original charges of murder and mutilating a corpse. It explains the context in which the murder occurred. The false imprisonment and kidnapping charges are the means to the end, the rape and murder of Teresa Halbach!

Under these facts, the additional offenses are so closely related that they are essentially the same criminal episode or transaction. Although the state need not establish all seven criteria to charge additional counts, it has. As a result, the state may charge the additional counts by amending the information.

Avery asserts that the additional crimes are "wholly unrelated" because there was no evidence adduced at the preliminary examination in support of the new charges. Avery cites no case law in support of applying a *sufficiency of the evidence adduced at preliminary examination* approach to the "not wholly unrelated" test. The state may charge additional counts by establishing direct evidence of them at the preliminary hearing or by establishing that they are not wholly unrelated to the charges testified to at

preliminary hearing. *State v. Burke,* 153 Wis. 2d at 457 and *Bailey v. State*, 65 Wis. 2d at 341.

Moreover, it is important to note that nowhere does Avery argue in his brief that the additional charges fail to meet the seven factor transactionally related test as that term is defined and applied in *State v. Bury*, 241 Wis. 2d 261; *State v. Richer,* 174 Wis. 2d 231; and S*tate v. Burke*, 153 Wis. 2d 445. Instead he argues that the charges are not transactionally related because they are "wholly unrelated to the testimony" adduced at preliminary examination. This is not the law.

In support of his argument, Avery relies in large part upon our supreme court's decision in *Bailey v. State*, 65 Wis. 2d 331, and the cases that follow it. Avery relies on the following language from *Bailey*: "The state in its information may allege acts in addition to those advanced on preliminary hearing so long as they are not wholly unrelated to the *transactions or facts considered or testified to at the preliminary*." *Bailey v. State* at 339 (emphasis supplied by defense; see defense brief at 6). This very language supports the state's position and refutes Avery's argument from the outset. Clearly, the opinion sets forth two ways in which the state may comply with the transactionally related requirement; 1) charge counts that are not wholly unrelated to transactions, or 2) charge counts not wholly unrelated to the facts considered or testified to at the preliminary hearing. Since the phrase *facts considered or testified to* appears as a separate disjunctive mode; the transaction mode must mean transactions not necessarily testified to but yet related to the charges sought by application of the seven factor test set

forth in Ba*iley, Burke and Richer.* Yet, Avery takes us on a tour of Wisconsin Supreme Court preliminary hearing case law while continuing to misread and misinterpret this language as well as the holding in the case. This is especially so, when one considers that the quote cited by the defense is from the part of the case where the court examines the history of preliminary law as it related to whether the adoption § 970.03(10) changed the law in Wisconsin.

In *Bailey* the state charged Bailey with only one crime, first degree murder. The information after preliminary examination charged four crimes. The defendant complained there was no evidence adduced at preliminary hearing to support the additional charges. The court's holding on the issue of whether the state could charge additional counts of indecent behavior with a child, enticement of a child for immoral purposes and attempted enticement of a child for immoral purposes is different from the quote cited. Consider the actual holding in *Bailey*:

> In this case, *even assuming there was no evidence presented as to them at the preliminary*, it is clear that the sex-related offenses, counts 2, 3 and 4, were not "wholly unrelated" to the murder count. They are related in terms of parties involved, witness involved, geographical proximity, time, physical evidence, motive and intent.

Bailey v. State, at 341 (emphasis added). Avery attempts to minimize the significance of this holding by pointing out there was (in his view) sufficient evidence adduced at the preliminary examination. Whether there was, or was not, it matters not. The supreme court was clearly expounding on the meaning of the "not wholly unrelated" test and giving meaning to the words *not wholly unrelated to transactions* aspect of the entire

phrase. The court was telling us there is a second way to comply with the transactionally related requirement. The supreme court drove the point home in *State v. Burke*, 153 Wis. 2d 445.

In *Burke*, the supreme court again made explicit that there are two ways of complying with the transactionally related requirement when it held:

> We conclude a prosecutor may bring additional charges in the information so long as the charges are not wholly unrelated to the transactions or facts considered or testified to at the preliminary examination, **irrespective of whether direct evidence concerning the charges had been produced at the preliminary examination.** The charges must be "related in terms of parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent." *Bailey,* 65 Wis. 2d at 341.

State v. Burke, 153 Wis. 2d at 457 (emphasis added). Thus, Avery restates the argument rejected in *Bailey* and *Burke*: that the facts used in the relatedness analysis can be drawn only from evidence adduced during the preliminary hearing. His justification; the supreme court was "simply incorrect" in *Burke* (defense brief at 9)! None of the supreme or significant appellate court cases that follow *Bailey* and *Burke* have interpreted the statute or the *Bailey* case any differently; not *Williams*, not *Richer* not *Akins* and not *Bury*.

To clarify further, *Richer* observed that the state must assume the burden of establishing the transactional link between the charges before including additional counts in the information not otherwise supported by independent fact-finding at the preliminary hearing. *State v. Richer*, 174 Wis. 2d at 249. According to *Richer*, this burden may be met in either of two ways: "if there is evidence direct or inferential in respect to that

[added count] adduced at the preliminary *or* if the subsequently charged felony is demonstrated by the state to be transactionally related, i.e., 'not wholly unrelated' to one or more of the felonies for which the defendant has been bound over for trial." *State v. Richer*, 174 Wis. 2d at 253-54 (emphasis added).

In this case, the argument is irrefutable and overwhelming that the additional charges are transactionally related, i.e., 'not wholly unrelated' to those originally addressed at the preliminary hearing, *i.e.*, first-degree intentional homicide and mutilation of a corpse. They are all part of the same course of conduct. As noted above, the murder and mutilation of a corpse would have had to occurred immediately following the kidnapping, false imprisonment and sexual assault of Teresa Halbach.

Dated this 31st day of March, 2006.

Respectfully submitted,

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