ORIGINAL

STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | MANITOWOC COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant,

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE BLOOD VIAL EVIDENCE; OR IN THE ALTERNATIVE, TO ANALYZE THE VIAL OF BLOOD

INTRODUCTION

By motion on December 6, 2006, the defendant notified the State of the existence of a vial of blood believed to be the blood of Steven Avery in the possession of the Manitowoc County Clerk of Courts. The following week, the State and the defense met at the Manitowoc County Courthouse and opened a Styrofoam box and observed a purple-topped vial of blood which had the name "Steven Avery" hand written on it. At the latest, the defense was aware of the existence of this vial of blood on July 20, 2006. The State believes that the defense knew of the existence much earlier because the defendant himself possessed such knowledge. The State was not aware of the potential existence of this extrinsic evidence of third party misconduct until the defense revealed the existence of the vial of blood in correspondence dated December 6, 2006. It should be noted that this was long after the state filed its Discovery Demand with the defense on February 1, 2006. Equally noteworthy is that the court ordered that this type of evidence be disclosed 30 days before trial (see Court order dated July 12, 2006). This case was originally set for trial the first week of September. This evidence should have been disclosed no later than the first week of August, approximately 10 to 12 days after it was discovered by the defense on July 20, 2006.

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One of the defenses in this case is that the Manitowoc County Sheriff's Department framed Steven Avery by planting his blood in Teresa Halbach's SUV. In support of this theory, the State understands the defense will seek to introduce into evidence the vial of the defendant's blood found in the possession of the Clerk of the Circuit Court for Manitowoc County. The defense theorizes that some of the blood was planted to incriminate the defendant. Thus, the defense is clearly inferring that some unknown third party committed the crime. They infer this because at the time the blood was to have been planted (November 3 through November 5, 2005), the killer or killers were unknown. The admitted involvement of the co-defendant, Brendan Dassey, was not known until March 1, 2006.

The state acknowledges the defendant's constitutional right to present a defense. We further acknowledge the defendant is free to challenge any and all of the evidence the state introduces in its attempt to convict the defendant. However, neither of these propositions is without limits. The constitutional right to present a defense is limited to relevant and otherwise admissible evidence. See: *e.g. United States v. Scheffer,* 523 U.S. 303 (1998) and *State v. Pullizano,* 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Similarly, the right to challenge the evidence is subject to control in numerous ways. Section 901.04 -.06 Stats. and § 906.11 for example.

Section 901.04(1) QUESTIONS OF ADMISSIBILITY GENERALLY provides:

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by a judge, subject to sub. (2) and ss. 971.31(11) and 972.11(2). In making the determination, the judge is bound by rules of evidence only with respect to privileges and as provided in s. 901.05." *Emphasis added.*

Subsection (3) "HEARING OUT OF THE PRESENCE OF A JURY," subsection (d) provides: "Any preliminary matter if the interest of justice so requires." These cases and statutes make

clear, that certain evidentiary matters are to be handled outside of the presence of the jury and prior to trial.

As indicated above, should the defense pursue the introduction of evidence suggesting that some other person committed the offenses charged, the identification of the person, motive and opportunity are required in a pretrial hearing to determine the admissibility of the evidence. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). By analogy, should the defense take the particular tack of challenging the authenticity and integrity of the state's evidence on a theory that Mr. Avery is being framed, that likewise would necessitate an identification of the person(s) thought to be responsible as well as the conduct supporting the "frame-up" theory in a pretrial motion and ruling. There are at least four reasons why this evidence should be excluded. The analysis begins with the case of *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997).

EXCLUSION ARGUMENT

The *Richardson* court clearly rejected the application of the *Denny* "legitimate tendency test" to determine the admissibility of frame-up evidence. *Richardson* at ¶ 19. That does not end the inquiry however. An examination of the *Richardson* opinion sets forth the analytical framework to determine the admissibility of "frame-up evidence." The court discussed at length the interplay between Wisconsin statutes 904.01, 904.02, and 904.03.

The first step in the analysis is to determine the relevance of the proffered evidence. In the case at hand, we do not know what the "proffered evidence" is or will be. The court cannot make a determination as to its relevance. If the defendant seeks to introduce evidence that a police officer deliberately planted or contaminated evidence (as opposed to negligently collecting or contaminating the evidence) in an effort to inculpate Mr. Avery, that accusation

necessarily involves one of police misconduct and the introduction of "other acts" of a yet to be identified third person or persons. One would naturally ask: Who knows about this; how could it have happened; and who is involved? If more than one is involved, just how deep does this conspiracy go and who was in charge? Such inquiries must be resolved pretrial and not in the middle of the trial.

The second step in the analysis is the determination of admissibility. Not all relevant evidence is admissible. Section 904.03 Stats.. Section 904.03 requires a balancing test. The court must balance the probative value of the evidence to determine if it is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Section 904.03 Stats.. Clearly, an allegation that the defendant is being framed could involve the risk of unfair prejudice, undue delay or result in misleading the jury if parameters on this evidence are not in place. That of course assumes that the evidence would be found admissible in the first place.

When issues like this arise, they must be dealt with prior to trial. The court cannot determine the relevance of yet to be identified evidence. Courts cannot balance the probative value of the evidence when the evidence has not been identified. Allegations of police misconduct involving the planting or contamination of evidence, other acts attributed to certain officers and other parties in support of the frame-up are clearly the type of evidence which must be dealt with pretrial.

For example, one might ask about the disciplinary history for these officers and whether there were other similar or related allegations or behaviors engaged in by these individuals. These are all matters, which in the interest of justice, should be addressed in pretrial motion

proceedings. Dealing with these issues in the middle of the trial would necessarily involve delay and may in fact result in a mistrial if not handled correctly. The court cannot engage in a balancing test when the court does not have a clear identification of what is to be balanced.

Second, since the introduction of frame-up evidence would seem to clearly infer that another unknown defendant assisted in the commission of this crime, the case of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) should likewise be considered in the court's analysis. In *Denny*, the Court of Appeals adopted the "legitimate tendency test" to determine the admissibility of evidence suggesting that another person committed the crime charged. The court held, "(t)hus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Denny* at 624.

Here, while there may be *arguable* evidence of motive on the part of the Manitowoc County Sheriff's Department officers to frame Steven Avery (because of the now-settled wrongful conviction lawsuit), there is absolutely no evidence that anyone in the Clerk of Courts office had any such motive. More importantly, there is absolutely no evidence that any member of the Sheriff's Department or Clerk of Courts had an opportunity to frame Steven Avery and thus become an after-the-fact conspirator in the death or cover-up of the death of Teresa Halbach. In addition, there is absolutely no evidence directly connecting any member of the Sheriff's Department or Clerk of Courts in a conspiracy to use this vial of blood to frame Steven Avery for the murder of Teresa Halbach.

Third, independent testing by the Federal Bureau of Investigation (FBI) will establish whether this vial of blood could be a source for any of Steven Avery's blood found in Teresa Halbach's SUV.

TESTING

Due to the late notice by the defense, the State asks the Court for the opportunity to chemically test and/or quantitate the volume of blood remaining in the vial. The State has learned that two facilities are capable of conducting the necessary chemical testing to determine whether bloodstains of Steven Avery found in the SUV of Teresa Halbach contain the presence of EDTA-preserved blood. EDTA is the preservative contained in purple-topped blood collection vials. The relevance of such testing would be to determine whether, as the defendant contends, law enforcement planted blood evidence in the SUV for purposes of inculpating the defendant for the murder of Teresa Halbach.

One of the two labs capable of conducting appropriate testing is the chemistry unit at the Federal Bureau of Investigation in Washington, D.C. The State's preference is to have the FBI accomplish the testing. This preference is based upon the FBI's experience, history and methodology with the testing process. The FBI, however, will require 3 to 4 months from the receipt of the samples to complete the testing. The other lab capable of accomplishing the testing is National Medical Services located in Willow Grove, Pennsylvania. National Medical Services can complete the testing earlier than the FBI, but results may not be available until shortly before trial or shortly after the trial starts. The State would not object to a defense admissibility of scientific evidence motion and would conduct such a hearing.

The State is faced with additional problems due to the late notice by the defense as to the existence of the vial of blood. There are many and varied aspects of the original blood chain and subsequent testing by Laboratory Corporation of America in 1996. For instance, concerning just exhibit 3 of Defendant's Motion for Order Allowing Access to Prior Court File, dated December 6, 2006, the State finds it necessary to 1) identify and interview the person with the initials

"DW"; 2) interview "M. Kraintz" who is believed to have drawn the vial of blood in question; 3) determine how much blood was drawn; 4) determine how much blood was used in the testing process; 5) determine whether the spot card exists; 6) determine how the blood was removed from the vial; and 7) determine whether additional blood was taken from the vial during testing. There are numerous other interviews and further investigation that must be accomplished to render the contemplated chemical testing and/or quantitation meaningful. It has been exceptionally difficult conducting further interviews, determining testing procedures and accomplishing additional investigation due to the late notice by the defense and the unavailability of people during the Christmas and New Year's Holiday season.

Due to the untimely notification by the defense of this extrinsic evidence of third party misconduct the State asks the Court to preclude introduction of and testimony concerning the vial of blood currently under seal, and cross examination of State's witnesses on why the chemical testing currently sought was not done. In the alternative, the State seeks a continuance in the interests of justice for the FBI to accomplish appropriate testing.

POST CONVICTION AND INTERESTS OF JUSTICE CONSIDERATIONS

Finally, it should be pointed out that this evidence, as it stands now, would be considered exculpatory evidence by the defense. As a result, common sense, Wisconsin Statutes §§ 974.06 and 974.07 and recent Wisconsin case law suggest that this evidence will eventually be tested. See, for example, *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), *State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98, and *State v. Moran*, 2005 WI 115, 284 Wis. 2d 24, 700 N.W. 2d 884.

In addition, it is very likely this blood would be tested if Mr. Avery is convicted of first degree murder under a possible theory of ineffective assistance of counsel. Under the current

post-conviction biological evidence testing scheme, the defense will be second-guessed for not having this supposedly exculpatory evidence, evidence that supports a frame-up, tested to provide support for the theory. On the other hand, if independent testing shows that the vial of blood could be the source of the defendant's blood found in Teresa Halbach's vehicle, then clearly a miscarriage of justice will be avoided by having that blood subjected to analysis prior to the trial.

Respectfully submitted this 3rd day of January, 2007.

Kenneth R. Kratz # 1013996
Calumet County District Attorney
Manitowoc County Special Prosecutor

Thomas J. Fallon #1007736
Assistant Attorney General
Manitowoc County Special Prosecutor

Norman A. Gahn #1003025
Assistant District Attorney
Manitowoc County Special Prosecutor

Attorneys for Plaintiff
Calumet County District Attorney's Office
206 Court Street, Chilton, WI 53014
(920) 849-1438