STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

STEVEN A. AVERY,
Defendant.

Case No. 05 CF 381

DECISION AND ORDER DENYING STATE'S MOTION FOR CONTINUANCE TO ANALYZE VIAL OF BLOOD

The State filed a two part motion on January 3, 2007. The motion asks the court to exclude blood vial evidence, or, in the alternative, permit the State to analyze the vial of blood. The motion relates to a vial of blood located in the Manitowoc County Clerk of Circuit Court office in the file for Case No. 85 FE 118 which the defendant has indicated is relevant to his frame-up defense. The State first argues that any evidence involving the blood vial should be excluded. The State further argues that in the event the evidence is not excluded, the court should grant a continuance of the trial in order to allow the State to analyze the blood in the vial and compare it to blood found at the crime scene to corroborate the State's claim that no blood evidence was planted at the crime scene by anyone. The defendant filed a response opposing the State's motion to exclude the blood vial

evidence and the Court heard further oral argument from the parties at a hearing on January 4, 2007.

The Court is not addressing at this time the State's motion to exclude the blood vial evidence. This is because the Court instructed defense counsel at the January 4, 2007 motion hearing to file with the court a motion in limine on or before January 12, 2007 identifying any "frame-up" evidence which the defense intends to offer at the trial, including evidence related to the vial of blood in the Clerk's office. Some of the arguments made by the parties concerning the State's motion to exclude the evidence, however, can be addressed.

The State argues in part that the blood vial evidence should be excluded because it is extrinsic evidence relating to a planting defense which was not disclosed at least 30 days prior to the scheduled start of trial as required by the Court's order of July 10, 2006. The defendant provided notice of the vial in its motion of December 6, 2006. The Court agrees with the defendant's analysis in its written response that because of the court's decision last August to adjourn the trial to February 5, 2007, the defense's notice of the proposed extrinsic evidence was provided in a timely manner, that is, more than 30 days before the scheduled start of trial.

The defendant argues that there is some ambiguity in the July 10, 2006 order of the court and that the blood vial evidence is not extrinsic evidence. The

defendant is wrong. The Court has been presented with no reason to consider admission of the blood vial evidence except for the defendant's argument that it supports his planting defense. As such, the proffered evidence is clearly extrinsic evidence relating to a planting defense. The Court will evaluate the defendant's offer, along with any other evidence offered to support a planting or "frame up" defense under the analysis described in State v. Richardson, 210 Wis. 2d 694 (S. Ct. 1997), following receipt of the defendant's proposed motion in limine. The Court's analysis will involve consideration not only of the relevance of the offered evidence, but its probative value. The Court anticipates that in the defendant's motion in limine he will include a plausible explanation as to how blood from the vial could have been extracted and placed at the crime scene, given whatever the current condition of the vial may be. Because the evidence may or may not be admissible, depending on the court's ruling, the motion in limine and any argument submitted by either party in support of or in opposition to the motion will be received under seal pending the Court's final ruling on any offered evidence. Sealing the papers is necessary to prevent public disclosure of inadmissible evidence close to the start of the trial.

STATE'S MOTION FOR CONTINUANCE TO PERMIT ANALYSIS OF THE VIAL OF BLOOD

The Court understands the State's position to be that if the Court excludes the blood vial evidence, no continuance of the trial date is required. While the Court has yet to rule on the admissibility of blood vial evidence, the Court will address at this time the State's motion for a continuance of the trial date to analyze the vial of blood, should it be determined to be admissible. The ruling is necessary at this time because the trial is scheduled to begin in just a few weeks.

The State seeks an adjournment so that it may examine the blood stains alleged to be those of the defendant found in the vehicle of Teresa Halbach in order to determine the presence of ethylenediaminetetraacetic acid (EDTA), a substance used as a preservative in purple-topped blood collection vials. (Neither party has suggested that the blood vial in the Clerk's office file is not such a vial.) The absence of EDTA in the blood found in the victim's vehicle, argues the State, would demonstrate that the blood collected from the vehicle did not come from a vial of preserved blood, and hence, could not have been planted. The defendant does not oppose the concept of testing, but does oppose an adjournment of the trial to facilitate such testing unless the Court modifies bail to facilitate the defendant's release. In addition, the defendant asks to reserve the right to challenge not only the significance of any results received as a result of such testing, but the validity

of any testing process itself. If the Court does not modify bail to permit the defendant's release, the defendant asks that the trial proceed as scheduled.

The court begins its analysis by an examination of the caselaw provided by the parties concerning the state of EDTA testing today. Both parties informed the Court during oral argument that the most recent judicial discussion of EDTA testing, and the most thorough discussion of the caselaw, is found in Cooper v. Brown, Case No. 04 CV 656H, a United States District Court decision from the Southern District of California issued in June of 2005. The defendant in that case, Kevin Cooper, was charged with viciously killing four people following his escape from a California State prison in 1983. He was convicted in 1985 and sentenced to be executed. As part of a petition for writ of habeas corpus in 2004, Cooper successfully argued to the 9th Circuit Court of Appeals that a t-shirt found at the crime scene which admittedly contained his blood should be tested for the presence of EDTA in order to determine whether his blood had been planted on the shirt. Cooper argued that the presence of EDTA would prove that his blood was placed on the t-shirt after the fact by someone who had access to his previously drawn blood. In his brief, Cooper concluded as follows:

> Through . . . testing for the presence of the preservative agent EDTA on a t-shirt the State belatedly claimed contained Mr. Cooper's blood, the question of Mr. Cooper's innocence can be answered once and for all." Cooper v. Woodford, 358 F. 3d 1117, 1124 (9th Cir. 2004).

The Court of Appeals accepted the defendant's argument and directed the District Court for the Southern District of California to "promptly order" that the test "be performed in order to evaluate Cooper's claim of innocence." *Id.*

The district court followed the 9th Circuit Court's directive, but concluded that EDTA testing does not provide anywhere near the level of certainty suggested by the 9th Circuit. The testing process took more than one year because of the lack of any standardized protocols for testing. The court gleans the following from its reading of Cooper:

1. Blood itself does not naturally contain any EDTA. EDTA is a synthetic chemical patented in 1935. Cooper, Slip Op. at p. 58.

2. While EDTA is used as a blood preservative, it also has multiple other applications, including use in food products, cleaning agents such as laundry and dish detergent, bathroom and kitchen tile cleaners, and personal care products such as cosmetics, hand lotions, deodorant and soap. In some of these products, it is present in much higher concentrations than its concentration in blood preservatives. *Id.* at 77.

3. There are no standardized protocols for testing the concentration levels of EDTA present in a particular sample.

4. More significantly, there are no established scientific standards for interpreting the significance of levels of EDTA found in any particular sample. In

the words of Cooper, "While the extraction and measurement of EDTA in a sample may theoretically be accomplished, the ubiquity of EDTA in the environment prevents any meaningful interpretation of the significance of an 'elevated' level of EDTA within a forensic sample." *Id.* at 69. This problem was illustrated by the tests performed in Cooper, where measurable samples of EDTA were found in areas of the t-shirt which were selected as control areas where the parties did not expect EDTA to be found.

It is against this background that the court evaluates the State's request for an adjournment to permit the conduct of EDTA testing. The court concludes that an adjournment of the trial for this purpose is not warranted for the following reasons:

1. *EDTA test results lack the probative value normally associated with scientific testing.* There is no doubt that advances in the field of forensic testing have significantly benefited the search for truth in criminal trials in recent years. One need only look at the DNA testing which resulted in Steven Avery's exoneration in the 1985 case as an example. The great benefit of DNA testing in that case was that the results led to only one conclusion. By contrast, the difficulty of measuring the presence of EDTA and, more significantly, determining the source of any EDTA found does not offer nearly the same level of conclusiveness. As summarized in Cooper:

"The widespread presence of EDTA in the environment can never be ruled out as the source of any EDTA detected in the specimen. In addition, since the history of each specimen's exposure to environmental EDTA is unknown, there are no established standards against which a test result can be compared. As a result, the fact finder can never reliably conclude from the presence of EDTA in a stain that tampering occurred. There are no industry standards that bind the testing scientist to a certain test protocol." *Id.* at 75.

The court in Cooper ruled that under the federal rules of evidence, the results of EDTA testing were not only inconclusive, but inadmissible as well. The parties here recognize, as does the Court, that the rules relating to the admissibility of expert evidence are more lenient in Wisconsin than in the federal courts. *See e.g.* State v. Peters, 192 Wis. 2d 674, 685-692. While EDTA test results might well be admissible in Wisconsin, however, they still lack the probative value and certainty of other scientific evidence. For this reason, a lengthy adjournment to allow for EDTA testing is not warranted. It is highly speculative as to whether EDTA testing, should it be done, would contribute to the search for truth in this case.

2. *An adjournment to allow EDTA testing could well result in a measurably longer delay than that suggested by the State.* The State argues it has been informed by the FBI that the agency has developed some unspecified new testing method, that test results could be provided within three to four months and that a delay of this duration is warranted. The court is not satisfied that an adjournment to facilitate EDTA testing would only require a three to four month delay of the trial. Even if the FBI conducted its testing within the time frame

provided to the State, the defense, should it be dissatisfied with the FBI test results, would probably be entitled to conduct a test of its own. This is especially likely given the absence of scientifically accepted protocols for the testing of EDTA in the interpretation of results. Cooper noted that at least as of 2005, the FBI was no longer even testing for the presence of EDTA. Cooper, footnote 27 at p. 72. In the Cooper case itself, it took the parties more than one year to complete only the one round of testing ordered by the 9th Circuit Court of Appeals.

3. *The State has had an opportunity to conduct EDTA testing on the blood allegedly belonging to the defendant found at the crime scene.* The Court accepts the State's representation that it did not learn of the existence of the blood vial in the Clerk of Circuit Court's office until it was disclosed by the defendant last month. However, the State has known for quite some time that the defendant intends to argue at trial that the evidence against him was planted. The State's memorandum in support of its motion seeks permission to perform "chemical testing to determine whether blood stains of Steven Avery found in the SUV of Teresa Halbach contained the presence of EDTA-preserved blood." The State could have conducted such tests some time ago if it believed that the state of the art of EDTA testing had reached the point where it could rule out preserved blood as the source of the blood found at the crime scene. While it is true that the testing of the vial in the Clerk's office may have the potential to strengthen the probative

value of any test results by offering the benefit of compared EDTA levels, there was nothing to prevent the State from testing the blood evidence in its possession for the presence of EDTA.

4. *Other factors.* The court finally notes that there are other factors militating against an adjournment of the trial. These include the diminishing memories of eyewitnesses over time and the fact, as noted by the defendant at argument, that because he is unable to make bail, he is deprived of his liberty pending the conclusion of the trial.

The trial is scheduled to start a full 15 months from the date the crimes charged are alleged to have been committed. If there was significant reason to believe that EDTA testing had the potential of providing strongly probative evidence, the court would be more inclined to consider adjourning the trial. However, all the available evidence presented to the court by the parties suggests that EDTA testing has, to this point in time, provided more confusion than conclusions in the cases in which it has been performed.

On a related issue, the Court concludes, pursuant to its authority under §904.03, that both parties should be prohibited from asking any questions at trial or making any argument relating to the failure of the other party to pursue EDTA testing. The Court comes to this conclusion because while, as the Court has noted above, EDTA test results might be determined to be admissible should they be

available, the novelty and questionable reliability of EDTA testing make the tests results of dubious probative value. If the Court were to permit either party to criticize the failure of the other to conduct testing, the trial could become sidetracked by involving evidence on a testing procedure of questionable validity that is not being used in any event. The defense has already indicated that had the Court granted the motion for a continuance of the trial, the defense would reserve the right to challenge not only the test results, but the integrity of the EDTA testing procedure itself, whatever procedure that might be. Allowing questions and argument relating to the failure of either party to conduct EDTA testing would result in a confusion of issues, unduly delay the conduct of the trial, and constitute a waste of time.

ORDER

Based on the foregoing decision, it is hereby ordered as follows:

1. The Court reserves ruling on the State's motion to exclude blood vial evidence pending receipt of the defendant's motion in limine seeking admission of any offered "frame-up" evidence. The defendant's motion, as well as any memoranda submitted in support of or in opposition to the motion, are ordered to be sealed pending the Court's decision on the admissibility of any offered evidence.

2. The State's motion for a continuance of the trial in order to conduct EDTA analysis of the vial of blood described in the State's motion is denied.

3. Both parties are prevented from making any reference at trial or asking any questions relating to the failure of the other party to pursue EDTA testing.

Dated this 9th day of January, 2007.

BY THE COURT:

Patrick L. Willis,
Circuit Court Judge