

ORIGINAL

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

Plaintiff,

JAN 18 2007

v.

CLERK OF CIRCUIT COURT

Case No.: 05-CF-381

Judge: Patrick L. Willis

STEVEN A. AVERY,

Defendant.

DEMAND FOR COMPLIANCE WITH DISCOVERY REQUESTS, SCHEDULING
ORDER AND § 971.23(2M) (AM) STATS.; OR IN THE ALTERNATIVE
TO EXCLUDE EXPERT TESTIMONY

Please take notice that on January 19, 2007 or soon thereafter as counsel may be heard, the state by Special Prosecutors Kenneth R. Kratz, Thomas J. Fallon and Norman A. Gahn will move the Court to order the Defendant to comply with his discovery obligations. If the defendant fails to timely comply, the State moves to exclude the expert witness testimony of Dr's. Scott I. Fairgrieve, Alan L. Friedman, and Laurence T. White.

In support of this Demand the state relies on §971.23(2m) (am) and (7m), Stats., two Discovery Demands and the Pretrial Scheduling Order of October 19, 2006.

Sec. 971.23(2m)(am), Wis. Stats. provides as follows:

Any relevant written or recorded statements of the witness named on a list under par. (a), including any reports or statements of experts made in connection with the case or if the expert does not prepare a report or statement a written summary of the experts findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that they defendant intends to offer in evidence at the trial.

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(1)

On or about October 6, 2006 the state filed a DNA case-specific discovery demand in addition to its previous general demand filed in February of 2006. On October 19, 2006 the court ordered production by the defense of any expert witness reports by January 5, 2007. The information provided by the defense is deficient and does not meet the statutory standard. It does not comply with either discovery demand nor does it comply with the October 19, 2006 Pretrial Scheduling Order.

Dr. Scott I. Fairgrieve

In his *Disclosure* defendant identifies only what “may be” the subject of Dr. Fairgrieve’s testimony; not what *will be* the subject of Dr. Fairgrieve’s testimony. Defendant does not identify what opinions will be expressed; nor does he identify any findings that will be presented. For example, Dr. Fairgrieve *may testify* about the identification of human remains and the appropriate method for recovery of suspected human remains including specific deficiencies in the recovery of the remains at issue in this case. (defendant’s *Disclosure* p. 2; emphasis added). In the very next sentence, Avery reports that “Dr. Fairgrieve *may also testify* about the methods and effects of the cremation of a human body, including the remains recovered by law enforcement authorities in this case, and the roll of temperature and duration in the rendering of a human body to cremains.” (defendant’s *Disclosure* p. 2. emphasis added). One final example, it is further reported “Dr. Fairgrieve *may also provide testimony* which may agree with, challenge, or differ with any of the opinions offered by the state’s expert anthropologists.” (defendant’s *Disclosure* p. 2. emphasis added).

Much like the defendant's *Statement on Third Party Liability* the *Disclosure* does not "Notice" anything. It appears that Dr. Fairgrieve did not make a report. In lieu of a report, defendant must provide a written summary of Dr. Fairgrieve's opinions or findings or the subject matter of his or her testimony. Here, we do not know what the actual testimony will be. The state does not know whether Dr. Fairgrieve will be rendering an opinion on any or all of these areas he "may testify" about. The *Disclosure* is deficient when it comes to providing any idea of what the testimony will be. Since the *Disclosure* does not reveal the existence of any scientific test, experiment, or comparison, we assume that Dr. Fairgrieve did no such test, experiment, or comparison. Therefore, no testimony of this nature is expected; and none should be received. However, that does not relieve the defendant from his obligation to provide a summary of what opinions or findings will be expressed by Dr. Fairgrieve.

Dr. Friedman

As with the information provided about what Dr Fairgrieve might say, the information provided about the expected testimony of Dr Friedman is likewise deficient. It does not comply with Pretrial Scheduling Order, it does not meet the statutory standard and it does not comply with the States general or more particularized discovery demands.

For example, an explanation of Dr. Friedman's expertise in "principles of avoidance." is absent and thus demanded. Further, it is not clear whether Dr. Friedman will actually offer an opinion about the reliability of the conclusions of the Wisconsin Crime Lab regarding the DNA identifications of Steven Avery and Teresa Halbach. Defendant

couches his *Disclosure* in terms of what "may be offered." At the Scheduling Conference, the defendant did not object to the general demand or the particularized discovery demand filed by the state concerning DNA evidence. At the October conference, the defense assured the state that it would provide the information demanded. The state again requests the following:

1. The full opinion and findings of Dr. Friedman's expected testimony about "the reliability (or lack thereof) of the conclusions of the Wisconsin Crime Lab in this case."

2. Any written reports prepared or opinions to be offered by Dr. Friedman detailing his exact concerns about the crime lab's conclusions.

3. Identify those "articles" or "locations" that Dr. Friedman finds the absence of DNA profile evidence to be significant; and provide any written reports prepared or a summary of any opinion testimony to be offered by him identifying those areas and detailing their significance.

4. Identify with more certainty the "potential flaws" in protocols and the "potential flaws" in the statistical analyses generated by the Wisconsin State Crime Lab and the FBI lab; and provide any written reports or a summary of any opinions or findings to be offered in court pertaining to and explaining these concerns.

5. Make more definite and certain the expected testimony of Dr. Friedman that may "challenge or differ" with the State's experts; and provide any written reports or a summary of the opinions or findings to be offered in court.

6. Make more definite and certain the nature of Dr. Friedman's testimony "as to the prosecution expert's analyses and conclusions drawn from such software projects," and provide any written reports or a summary of the opinions to be offered in court.

7. In addition, the state now supplements its discovery demand with a request for a copy of Dr. Friedman's contamination log as well as any reports of contamination in his laboratory.

In essence, the state demands that defendant comply with the state's Demands for Discovery and Inspection, filed on or about February 1 and October 6, 2006. The state has not been provided with any material or information requested under paragraph 2. of the October Demand.

Dr. White

Much the same can be said about the proffered testimony of Dr. White. Assuming Mr. Dassey testifies and assuming defendant can overcome other evidentiary hurdles associated with the admission of this type of testimony, he nonetheless fails to tell us what the actual testimony of Dr. White will be. Defendant's summary is likewise couched in terms "may be called to testify", Dr. White "would likely testify about risk factors...." or "Dr. White may also testify that his review of police interrogations of Brendan Dassey....".

Nowhere does defendant tell us what opinions Dr. White will express on the stand. Frankly, the state has serious doubts that this testimony is admissible in the first place; and that is another reason why the state demands compliance. The state requests an offer of

proof from the defendant; and that an evidentiary hearing occur before Dr. White takes the stand to determine the admissibility of his testimony.

Applicable law

The case most applicable to the issue at hand is *State v. Schroeder*, 2000 Wis. App. 128, 237 Wis. 2d 575, 613 N.W.2d 911. In *Schroeder* the court dealt with the issue of whether the prosecution adequately complied with § 971.23(1)(e) (1997-98). *Schroeder* was a case that dealt with a defense claim on appeal that the state did not adequately disclose the nature of the expert witness testimony introduced at trial. The state disclosed to the defense a copy of a police report describing an investigator's meeting with a forensic pediatrician. The pediatrician repeatedly indicated to the officer why the pediatrician believed the girl depicted in a photograph, which was the basis for a child pornography prosecution, was underage. Defendant's counsel asserted that he did not know what the *Tanner Scale* was and that he did not have adequate notice of the intended testimony of the State. The court ruled that the statute in question, which mirrors § 971.23(2m)(am), of the current statute, "does not require that an expert make out a report reciting in detail the bases for his or her opinion. Rather, it requires that the defense be provided with the report if one has been prepared or, if the expert does not prepare a report, a written summary of findings." *Schroeder*, at 582. The court elaborated: "As with other pretrial discovery, the purpose of turning over findings to defendants is to enable them to prepare for trial themselves, *See State v. Mayday*, 179 Wis. 2d. 346, 354, 507 N.W.2d 365 (Ct. App. 1993), not to do their preparation for them." *Schroeder*, at 582. Since the defense has the same statutory obligation as the state, *Schroeder* controls. In this case, the defendant failed to

provide the state with any meaningful notice of what the testimony of Dr.'s Fairgrieve, Friedman and White will be. No opinions and no findings are identified. It is not known opinions will be elicited on the stand. This is simply an attempt at trial by ambush.

Available Remedies

The imposition of a sanction for discovery abuse is in the discretion of the trial court. *Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 643, 360 N.W.2d 554, 560 (Ct. App. 1984). *State v. Wild*, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988).

The preferred remedy is to demand immediate compliance with the statute, the state's general discovery demand filed last February, the more particular demand of October 6th and the court's October 19, 2006 Pretrial Scheduling Order. The exclusion of testimony is not preferred. *State v. Wild*, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988). Before the court can consider the remedy of exclusion it must first determine whether the non complying party, the defendant, has shown good cause for the failure to comply. *Wild*, at 27. If good cause is not shown, the statute is mandatory-the evidence *shall* be excluded. *See In Re E.B.*, 111 Wis. 2d 175, 185, 330 N.W.2d 584, 590 (1983). *Wild*, at 27.

However if this court concludes that "good cause" exists, it does not preclude the court from excluding the evidence as a sanction; it simply means that exclusion is no longer mandatory. Sec. 921.23(7m), Wis. Stats. The only other viable alternative is to grant a recess or continuance. *Wild*, at 28. It does not appear the court is of a mind to grant a continuance at this late date in view of the Court's denial of the State's request to adjourn to facilitate forensic analysis of the vial of blood found in the Clerk of Courts Office.

Consequently, the state demands immediate compliance with the existing discovery demands, §971.23(2m)(am) Stats. and the Pretrial Scheduling Order within three days. Otherwise, the court must exclude the expert testimony.

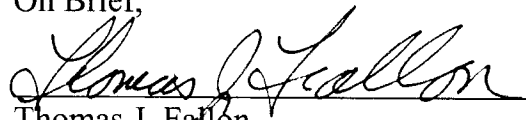
Dated this 12th day of January, 2007.

Respectfully submitted,

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