STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
MAR 4 2007
CLERK OF CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SEQUENTIAL INDEPENDENT TESTING AND FUNDING

I.

INTRODUCTION

An interesting thread runs through the state's Motion to Admit EDTA Test Results and Reply, tendered to the Court on March 1, 2007. That is the idea that Steven Avery and his lawyers have been "gambling" with the blood vial in the Clerk's office and with Mr. Avery's insistence, beginning before his arrest in November 2005, that someone planted his blood if it was in Teresa Halbach's car. Were Avery to accept the premise of gambling and to squabble over it, he might note that the state gambled by dismissing his assertion out of hand, without ever so much as checking the public file that held a vial of Avery's whole blood. He might

note also that the state finally sought, on the eve of trial and during this trial, to do the same test for the presence of EDTA in the dried bloodstains in Teresa Halbach's car that it explicitly considered doing in *February 2006,* and decided then strategically not to do.

But Avery is not inclined to get into a gambling dispute. Rather, he steps back and considers the state's very choice of that analogy. If the prosecution truly supposes that Steven Avery, his lawyers, or anyone else have been "gambling" over a young woman's death and the prospect that a man will spend the rest of his life locked in a prison cell, then the defense cannot imagine that Avery's mother and father, the Halbach family, the Court itself, or the public at large share that supposition. Something much more important is at stake for the rest of the participants in this tragedy than a pile of chips, a $5 stake, or the chance that thrown die will turn up snake-eyes. For everyone, save the prosecution apparently, justice is at stake.

And as a matter of justice, the prosecution at least might have addressed the fairness of a trial in which only the state can test critical blood samples, and the defense is denied any opportunity to conduct independent testing of portions of the same samples. Sure, the defense might try to meet FBI testing by mere cross-examination. But might not another, possibly more effective, answer to FBI testing

be independent testing that proves the FBI wrong? In other words, does not an accused in this country have the right both to confront witnesses *and* to present a defense or to answer a charge with his own evidence? Steven Avery thinks so. Indeed, Avery hazards a guess that he need not choose between confrontation under the Sixth Amendment, and being heard or presenting a defense under the Due Process Clause of the Fourteenth Amendment and the fair trial that the Sixth Amendment's protections collectively are designed to assure. And if so, he surely need not let the prosecution make that choice for him, which the timing of testing here has done. As a necessary specific application of this principle, Avery also believes that both Wisconsin law and the federal and state constitutions contemplate equal access to physical evidence for scientific testing, where the physical evidence can be partitioned and preserved as it has been here.

The Court asked for Wisconsin authority either party might offer on that question of independent testing. The state tendered its brief on March 1, but did not answer the Court's question. Avery now replies, with his focus on what the Court asked.

II.

REPLY

The Wisconsin Statutes adopt a position of neutrality on the testing of scientific evidence, favoring neither the state nor the defendant in a criminal case. "On motion of a party . . .," section 971.23 provides, "the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes." WIS. STAT. § 971.23(5). Either party or both may seek testing, then, and scientific analysis may be appropriate as to any physical evidence that either side intends to offer at trial.

The Comment to the 1969 statutory revision that added § 971.23(5) explains quite clearly the rationale of that provision, and confirms expressly that either party may seek scientific testing. The Comment reads in part:

> Subs. (4) and (5) are concerned with physical evidence and inspection and testing thereof. Experience under Fed. Rule 16 has demonstrated that this insures fairness and saves considerable time at trial. It is virtually impossible to refute physical evidence without an opportunity in advance to examine it and, as the Supreme Court of Oklahoma said in *State v. Lackey*, 319 P.2d 610, 614, referring to a laboratory analysis, "Certainly, if it contains factual truth, as we presume it does, the elements thereof are irrefutable. On the other hand, if it shows the defendant was not connected with the tragedy, he is entitled to the benefit of it."

WIS. STAT. § 971.23 Comment.

Perhaps because the statute and its comment so clearly preserve the right, case law in Wisconsin is sparse on a defendant's option to test independently the physical evidence, at least when the state's testing does not consume the entire sample. Here, of course, consumption of the sample affords no refuge for the state: its testing clearly did not consume the physical evidence. Plenty remains for independent testing by the defense.

Although they are not numerous, Wisconsin decisions are consistent with the proposition that the parties to a criminal case must have equal opportunity to conduct scientific testing. Further, the cases are consistent with the 1969 Committee's comment that, "It is virtually impossible to refute physical evidence without an opportunity in advance to examine it." WIS. STAT. § 971.23 Comment.

The Wisconsin Court of Appeals has explained that, "§ 971.23(5) permits either party to seek an order directing the production of physical evidence for scientific analysis under such conditions as the court deems proper." *State v. Franszczak*, 256 Wis. 2d 68, 72-73, 647 N.W.2d 396, 399 (Ct. App. 2002). More importantly, in *Franszczak*, the fact that the defense had an opportunity to retain an expert and conduct independent testing allowed the defendant "the opportunity to do battle with the State's expert at trial." *Franszczak*, 256 Wis. 2d at 78, 647 N.W.2d

at 402. "Both sides presented their experts on the question of whether the evidence implicated or exonerated Franszczak. This 'battle of the experts' was exactly what the law contemplates." *Id.*

Less specifically, the Wisconsin Supreme Court has noted that § 971.23(5) "allows for pretrial discovery of scientific evidence." *State v. O'Brien*, 223 Wis. 2d 303, 319, 588 N.W.2d 8, 15 (1999). In that context, *O'Brien* referred to a defendant's right to pretrial discovery, although the holding of that case concerned post-trial discovery.

The decision in *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), itself has a bearing on the availability of independent testing. There, the supreme court concluded after a long discussion that retesting a used ampoule from a Breathalyzer machine would do no good to either party; it could not provide exculpatory evidence for the defendant or additional inculpatory evidence for the state, because the contents are not stable over time.

"Nevertheless," the *Walstad* court added, "the due process rights of a defendant accused of operating a motor vehicle while under the influence of an intoxicant must be protected." *Walstad*, 119 Wis. 2d at 523, 351 N.W.2d at 489. Cross-examination is one important protection, the court explained. But so, too, is the right to a second test that the defendant could retest later. *Walstad* surveyed

several cases that discussed second tests of suspected drunk drivers, and noted that the Wisconsin Statutes assured a second test at the state's expense upon the driver's request. *Id.* at 525-27, 351 N.W.2d at 490. The *Walstad* court then added, "While we adopt the rationale of none of these cases at this time, it is apparent that a common thread runs through all of them – that the right to a timely second test, which may provide exculpatory evidence, or at any rate provide evidence material to the defendant's guilt or innocence – supplies an element of due process which may be missing where an alcohol test which is prima facie correct cannot be challenged because the chemical or reagents used in the original test cannot be retested." *Id.* at 526, 351 N.W.2d at 490.

Thus, the principal case on which the state relies for admissibility of its mid-trial EDTA test also supports, in a general way, Avery's due process right to conduct independent testing of his own. Here, samples remain and may be tested just as profitably by the defense as by the state. *See also State v. Disch*, 119 Wis. 2d 461, 471, 351 N.W.2d 492, 497 (1984) ("The defendant is in no case limited in proof to the single test first selected by the law enforcement agency. There is the express and mandatorily required opportunity to have an additional test and by an independent operator. Surely this is an impartial and near-controlling factor, which protects the due process right of a defendant").

While not directly applicable here, this Court also ought take note of the clear trend in Wisconsin law on post-conviction testing of physical evidence. Even after conviction at a fair trial, a defendant is entitled to pursue independent testing of physical evidence under WIS. STAT. § 974.07(6). In *State v. Hudson*, 273 Wis. 2d 707, 713, 681 N.W.2d 316, 319 (Ct. App. 2004), the state conceded that "the trial court erred by construing the statute to prevent independent testing of certain items at Hudson's expense, subject to protective conditions imposed by the trial court." *See also State v. Moran*, 284 Wis. 2d 24, 46, 700 N.W.2d 884, 895 (2005) ("Assuming that the State possesses material that the movant wishes to test, the circuit court must undertake the three-pronged analysis in WIS. STAT. § 974.07(2). If these requirements are satisfied, the plain language of the statute dictates that the movant should receive access to the evidence, and may subject the material to DNA testing at his or her own expense"). A rule that forbid a defendant an opportunity for independent testing of physical evidence before a jury verdict, but allowed it after the verdict, would undermine goals of judicial efficiency, fair trials, accurate determinations of guilt or innocence at a first trial, and timely administration of criminal justice.

Avery has a right to independent testing of physical evidence, then, under § 971.23(5) and the Due Process clauses of both the Fourteenth Amendment to the

United States Constitution and Article I, § 8 of the Wisconsin Constitution. This Court must act to preserve that right, if it admits the state's EDTA test results.

III.

CONCLUSION

For the reasons that he explains here and that he offered in his original motion on February 25, Steven Avery asks the Court to preserve his right to a fair trial by permitting him to undertake independent testing of the blood vial and dried bloodstains in the Toyota RAV-4, permitting him also to engage an expert witness or consultant, providing public funding for these purposes, and declaring a mistrial or adjourning this trial for several months to permit the defense to retain that expert and pursue independent testing. No one but the prosecution thinks anyone has been "gambling" in this case, and the Court ought in any event decline the state's implicit suggestion that a murder case be decided on a craps table.

Dated at Madison, Wisconsin, March 4, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

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