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May 14, 2013

The Honorable Angela Sutkiewicz
Sheboygan County Circuit Court, Branch 3
615 North 6th Street
Sheboygan, WI 53081

RE: State of Wisconsin v. Steven A Avery
Manitowoc Court Case No. 05CF381

Dear Judge Sutkiewicz:

On behalf of the state, Assistant DA Norm Gahn and I write to give the Court our assessment of Mr. Avery's recent post-conviction pleading. We believe many of his claims can be denied outright, without a hearing, because they are barred by either the rule announced in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and or because he has forfeited his right to raise these claims now given he did not raise and preserve them in the trial court. See *State v. Huebner*, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727; and State *v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, wherein the court clarified the distinction between waiving and forfeiting claims. In this case, the claims have been forfeited.

Pursuant to sec. 974.06(4), Stats., issues that could have been but were not raised in earlier post-conviction motion or on appeal may not be raised in a later motion under this section unless the party establishes "sufficient reason" for failing to raise the issues in earlier proceedings. *Escalona-Naranjo*, 181-82. Avery's post-conviction motion for relief fails to cite any reason, much less a sufficient reason, why several of his claims could not have been raised sooner.

Additionally, a claim that post-conviction counsels were ineffective may be a sufficient reason under § 974.06(4) for not raising the issue in Avery's direct post-conviction motion and appeal. See State ex rel. *Rothering v McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W. 2d 136 (Ct.App.1996). However, a bald assertion that a defendant's lawyers alleged ineffectiveness provides sufficient reason for failing to previously raise these issues is not, by itself, enough. See *State v Balliette*, 2011 WI

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79, ¶ 65, 336 Wis. 2d 358, 805 N.W. 2d 334. A defendant is required to explain, "why it was deficient performance" for his lawyers not to raise these issues. See *Id.* (Emphasis in original). Stated differently, the defendant must show why his lawyers' failure to raise the issues fell below an objective standard of reasonableness and overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy. See *Id.* at ¶ 67. We point out that it is a fundamental principle of appellate review that issues must be preserved at the circuit court. *State v. Huebner*, ¶10. Issues not preserved at the circuit court, even constitutional errors, generally will not be considered on appeal. *Id.* Again, any party raising an issue on appeal bears the burden of showing that the issue was raised in the circuit court, thereby preserving the issue/error. *Id.* The reason for this forfeiture rule is to prevent attorneys from "sandbagging" errors or failing to object for strategic reasons and then later claiming that the error is grounds for reversal. *Id.* at ¶12. Both of these legal doctrines are applicable in Avery's case. We turn now to a brief examination of Avery's claims.

As to Claim I: The Right to Counsel/the Right to Confer in Private

This is an issue that could have been raised in the trial court at or before trial. Trial counsel did not raise it. Further, it was not raised by appellate counsel when arguably it could have. This is really a claim of ineffective assistance of trial counsel that would be barred by *Escalona-Naranjo*. However, it could also involve a claim of ineffective assistance of appellate counsel. However, Avery failed to allege deficient performance of appellate counsel, and he has failed to demonstrate how he was prejudiced given the record made in the trial court.

As to Claim I A: Monitored Conversations

This is the one claim that *may* require additional factual development before the Court can rule. This claim may or may not be barred given the fact that it is apparent from Avery's pleading and Exhibit I that trial counsel were well aware of certain limitations placed upon them and their ability to work with Mr. Avery given his "chatty nature." However, Avery fails to allege specifically that any private, confidential, and/or secret communications with defense counsel were in fact monitored. Additionally, he fails to allege any facts indicating that the prosecutors were aware of specific conversations or meetings being held between Avery and the defense team. Lastly, Avery fails to allege how he was prejudiced by this "assumed" lack of deficient performance on the part of trial counsel. Since trial counsel was well aware of these limitations, this claim might be very well barred under the forfeiture rule. The State does acknowledge that all of Avery's phone conversations to his many family and friends were in fact monitored. All of those calls were provided to the defense. There were hundreds of such calls. However, no recording of any conversation between Avery and his attorneys was made known to the prosecutors, nor was any such recording played during the trial.

This claim is further complicated in that it may involve a claim of ineffective assistance on the part of appellate counsel. Appellate counsel was probably aware of

the circumstances under which trial counsel worked (Exhibit 1). Yet, they did not raise this claim. The State suspects the claim was not raised because it is without merit.

As to Claim II: Commenting on Silence in Closing Argument

Avery alleges that his trial attorney, Mr. Strang, objected but did not move for a mistrial. However, to preserve an objection to a prosecutor's closing argument, a defendant must contemporaneously object and move for a mistrial. *State v. Guzman*, 2001 WI App 54 ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. Interestingly, Avery does not claim that his trial counsel were ineffective for failing to object and move for a mistrial. The reasons why counsel did not move for a mistrial can be gleaned from the post-conviction testimony of Attorneys Strang and Buting regarding the substitute juror issue (discussed below) and are equally applicable here. Avery's trial lawyers assessed the state of the evidence and concluded that Avery's best shot at success was with the current jury and not with another jury if a mistrial was granted. Consequently, this claim is barred.

As to Claims III and IV: Unbiased Judge

This claim barely deserves a response. The fact that Judge Willis was both the preliminary hearing magistrate and the trial judge is of no consequence here. The preliminary hearing judge merely determines whether the evidence presented at the preliminary hearing, if believed, establishes that the defendant probably committed a felony. *State v. Dunn*, 121 Wis. 2d 389, 396-98, 359 N.W.2d 151, 154-55 (1984). This is what is required of the magistrate judge. If Avery's claim had any merit, the courts would be overwhelmed with recusals. Both *Huebner* and *Escalona-Naranjo* bar these claims in addition to being absurd.

As to Claim V: Failing to File Suppression Motion

This claim is barred both by *Huebner* and *Escalona-Naranjo*. Avery does not claim that trial counsel were ineffective for failing to raise the *absence of a seal* on the warrant as a basis for a suppression motion. This claim provides no basis for relief. See, *Avery v. Kratz*, no. 12-3467, 2013 WL 1449992 (7th Cir. Apr. 5, 2013) (unpublished decision), slip op. at p. 3.

Similarly, Avery does not claim that trial counsel were ineffective because they did not challenge the *absence of a record* made of the judge actually reading the affidavit(s) in support of the multiple warrants issued in this case. Similarly, he does not claim that appellate counsels were ineffective either. This claim is absurd as well. There is no requirement that a seal be imposed on warrants or that a record is made of a judge's review of an affidavit. The reasons are obvious.

As to Claim VI: Break in the Chain of Custody

The argument is the same here as it was for Claim V above. This claim is barred by both principles. One is not entitled to the establishment of a "perfect chain"

before evidence may be admitted. *Breaks* in a chain go to the weight of the evidence. Given the defense in this case was planted evidence (Halbach's vehicle), this issue was well addressed (in a different way than Avery now presents it) during the trial. The state also points out that although the defendant's car was seized, no such evidence obtained from it was used during the trial. Defendant cannot establish prejudice and because he does not claim trial counsel or appellate counsel were ineffective these claims are barred.

As to Claims VII and VIII: Misjoinder and Retroactive Misjoinder

With regards to these claims, Avery does not set forth sufficient facts as to why trial counsel failed to assert a claim of misjoinder and/or a motion for severance at the time of trial. Avery fails to set forth a claim that his trial lawyers and/or his appellate lawyers were ineffective for not challenging the joinder. The Court need not review much more than the original Criminal Complaint to conclude that any challenge based on misjoinder or a failure to move for severance is anything other than frivolous. Consequently, these claims are barred.

As to Claim IX: Trial Counsel was Ineffective for Failing to Develop the Planted Evidence Argument

The State finds this claim quite interesting. It is clear Avery claims his trial counsel were ineffective. However, he fails to allege his appellate counsel were ineffective for not raising trial counsel's *omission* (sic!). There are many conclusory allegations here, but there are no facts. Avery's pleading does not satisfy the requirements of *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); *motion for reconsideration denied*, 205 Wis. 2d 139, 555 N.W.2d 818 (1996). More importantly, the entire trial was a challenge to the investigative efforts of both the Manitowoc County and Calumet County Sheriff's Departments. The defense offered by Avery at the time of trial was that officers of the Manitowoc County Sheriff's Department held a strong bias against Avery, so strong in fact that they planted evidence of his guilt. *The primary thrust of Avery's defense was the planted evidence defense.* Specifically, that the State planted his blood in Halbach's vehicle. The fact that Avery is now unhappy, or that the planting evidence defense could have or should have been done differently is insufficient proof that trial counsel provided deficient performance, and is certainly no evidence of prejudice. See e.g. *Weatherall v. State*, 73 Wis. 2d 22, 242 N.W.2d 220 (1976), and generally *Strickland v. Washington*, 466 U.S.668 (1984).

As to Claim X: Defect in the Appointment of a Special Prosecutor

This claim is barred by the forfeiture rule. Any claim premised upon the fact that one of the prosecutors was improperly appointed goes to the personal jurisdiction of the court. See generally, *In re the Commitment of Bollig*, 222 Wis. 2d 558, 587 N.W.2d 908 (Ct. App. 1998). Additionally, assuming there is an error (which the State does not believe there is), Avery fails to allege how he was prejudiced when an Assistant Attorney General, authorized to practice statewide as a prosecutor, assisted in his

prosecution. There is nothing under sec. 978.045, Stats., which requires a signed oath to serve as a special prosecutor. If there was an objection, it should have been raised in the trial court at the time of the appointment and/or before trial. Any objection not raised in the trial court is forfeited.

As to Claim XI: The Unbiased Jury

Here again, Avery raises a claim of ineffective assistance of counsel, yet it is undeveloped. However, an examination of the record reveals that a motion to change venue for the jurors was brought in September of 2006. The ruling on the motion was deferred pending selection of the jury. An examination of the four days of jury selection, along with the use of Supplemental Juror Questionnaires easily resolves this claim against the defendant. There are no facts set forth in his pleading that demonstrate trial counsel were deficient. In point of fact, the decision to go forward with a Manitowoc County jury was a strategy decision made by the defense. Quite frankly, it was easier for the defendant to sell the *frame-up defense* to a Manitowoc jury, who were already familiar with the Avery saga(conviction followed by exoneration followed by law suit). The defendant fails to assert how he was prejudiced by this trial *strategy* decision. Additionally, Avery does not claim that his appellate counsel were ineffective for not challenging the decision made by trial counsel.

As to the individual juror claims, Avery once again fails to assert a claim, with facts indicative of deficient performance and why he was prejudiced by the decisions of trial counsel. Similarly, he fails to allege, with sufficient fact why appellate counsel failed to raise the claim. The decision of who to *challenge for cause* or by *peremptory challenge* is most often a strategy decision. Avery fails to establish in his pleading any objective or statutory bias regarding either juror that would be cause for removal. See generally, *State v. Lindell*, 2001 WI 108, 245 Wis.2d 689, 629 N.W.2d 223. This claim has been forfeit.

In summary, almost all of these claims are barred for one reason or another. The only claim that *might* have a basis in fact is the claim that Avery was prejudiced because of his inability to have unmonitored, frank, and confidential discussions with trial counsel. However, the facts are undeveloped. The state asks the court to direct Mr. Avery to supplement his pleading with additional facts. The court can then make a determination as to whether an evidentiary hearing is needed or dismiss the allegation.

However, if the court wants to have an evidentiary hearing on any of these claims and offer Mr. Avery the opportunity to make his case, we will be ready to respond.

Very truly yours,

Thomas J. Fallon
Assistant District Attorney

cc: ADA Norm Gahn
Steven Avery