

FILED

STATE OF WISCONSIN,

NOV 23 2015

v.

CLERK OF CIRCUIT COURT Case No.: 05 CF 381
MANITOWOC COUNTY, WI

STEVEN A. AVERY,

Defendant.

MEMORANDUM DECISION AND ORDER

Steven Avery has filed a motion with this court under Wis. Stats. §974.06, requesting an order vacating his judgment of conviction and sentence. On those grounds, the defendant is requesting that a new trial be ordered. His motion before this court further requests an evidentiary hearing at which he can appear either in person or by telephone.

Avery was convicted on March 18, 2007, after a jury trial lasting almost five weeks. The defendant was found guilty of being party to the crime of first degree intentional homicide of Teresa Halbach and of a further charge of being a felon in possession of a firearm. On June 29, 2009, Avery filed a direct post-conviction motion requesting a new trial on the grounds that the trial court erred in denying his motion to suppress certain search evidence; that the trial court erred in barring his presentation of third-party liability evidence; and, that the court erred by excusing of a deliberating juror. The defendant argued that those errors transgressed his fundamental rights. Judge Willis' decision denying his motion was unsuccessfully appealed by Avery to the Wisconsin

Court of Appeals. *State v. Avery*, 2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216. Avery's subsequent petition for review to the Wisconsin Supreme Court was denied.

Motions under §974.06 are, as in this one, filed after a defendant loses his or her direct appeal. They are procedurally barred if a defendant raises new issues on a collateral review that he did not raise in the prior post-conviction proceeding unless the defendant shows a "sufficient reason" as to why these issues were not raised in the earlier proceedings. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-182, 517 N.W.2d 157 (1994). Avery's latest filing raises numerous claims supporting his contention that he is entitled to relief, some of which have been made in prior courts, albeit in slightly different language and some of which appear to be original to this motion.

DISCUSSION

Avery's first contention in his brief supporting his motion is that his right to counsel guaranteed by Article 1, §7 of the Wisconsin Constitution and the Sixth Amendment of the U.S. Constitution was impermissibly infringed upon by certain state conduct. The conduct of which Avery complains in this part of his motion is the purported intrusion by law enforcement in the defendant's communications with his trial counsel. The heart of his legal argument is that his lawyer-client privilege was vitiated by the state when it purportedly monitored his conversations with his attorneys at the Calumet County Jail. This, Avery said, had a chilling effect on his Sixth Amendment right because he was unable to have candid discussions with his lawyers for fear that state investigators would plumb those communications for investigative information. His

brief references several attached exhibits which he believes provide evidence of the state's unconstitutional activities. From this, he concludes that the state not only monitored his protected communications with his attorneys, but, in all likelihood, used the information collected from those activities to prepare its trial strategy.

In charging that the state violated his federal and state constitutional right to counsel, Avery's brief makes extensive use of federal case law, citing and quoting from a number of federal courts of appeals and U.S. Supreme Court cases, most of which have little or nothing to do with the position he seeks to advance. Other than expressing his opinion that he was somehow denied his right to counsel under Article 1, §7 of the Wisconsin Constitution and Sixth Amendment to the U.S. Constitution, Avery provides no factual information of any evidentiary value that this was the case.

Because of the seriousness of his allegations, the court appointed two attorneys and authorized expenditure to hire a private investigator to further investigate the defendant's claims. After more than a year of examination of the defendant's claims, Attorney Thomas Aquino reported back to the court. Attorney Aquino reported that after extensive communications with trial counsel, interviews between the investigator and jail officials, and review of trial transcripts and thousands of pages of investigative reports and other discovery, the attorney and his team could not locate any additional factual evidence that would support the defendant's claim as to the violation of his right to counsel.

Moreover, Avery's constitutional claims about the state's violation of his right to counsel could have been but were not raised in his direct appeal of his case. Any constitutional claim he is now raising or attempting to raise in this motion is procedurally

barred unless Avery can show a sufficient reason why those issues weren't raised in prior proceedings. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185; 517 N.W.2d 157 (1994). He makes no showing in his motion as to why this issue was not raised in his direct appeal; since this is an issue that could have been raised on his direct appeal, Avery is barred by §974.06(4) from bringing it before this court.

Avery's motion next faults the prosecution for implicitly commenting on Avery's silence in District Attorney Kenneth Kratz's closing argument. Avery believes that the DA's reference in this closing to some of the facts in the case as "uncontested" unfairly called attention to Avery's silence brought about by his exercise of his Fifth Amendment rights. This court finds nothing in those portions of the DA's argument quoted in the defendant's brief that supports his claim that his choice not to testify was highlighted by or mentioned by the DA in his closing statements. Moreover, in order to preserve his charge of prosecutorial misconduct, an objection coupled with a motion for mistrial would have had to have been made at trial. *State v. Guzman*, 2001 WI App 54 §25, 241 Wis. 2d 310, 624 N.W.2d 717. Since this was not done, the issue is not properly before this court.

The defendant next argues that his due process rights were violated because the trial judge was biased in this matter. Under Wisconsin Statute §970.03(1), a defendant is entitled to a preliminary hearing before a court to determine whether or not there exists probable cause to believe a felony has been committed by that defendant. If the court finds that probable cause exists that the defendant has committed a felony, it must bind the defendant over for trial. Wis. Stats. §970.03(7); *State v. Lindholm*, 2000 WI App 225 §1, 239 Wis. 2d 167, 619 N.W.2d 267. The defendant's motion and brief asserts that

Judge Willis, the trial judge, was not unbiased because he found that there was probable cause to hold the defendant over for trial at his December 6, 2005, preliminary hearing. This finding, the defendant argues, constitutes a disqualifying bias which should have prevented Judge Willis from proceeding with the case. By failing to move that Judge Willis recuse himself from the case or request a change of venue, trial counsel provided ineffective assistance of counsel.

A review of the transcript reveals what Judge Willis actually said at the close of the preliminary hearing, "Based on the evidence presented, the court is going to determine that there's probable cause to believe that a felony has been committed in each of these cases, that is 05 CF 375 and 05 CF 381." (Transcript, 12-6-2005, p. 180, l. 23 to 25 and p. 181, l. 1 and 2). In making his finding, Judge Willis concluded that the evidence presented at the preliminary examination justified a bindover for trial. Nothing he said or did indicates any bias or prejudice on his part. This claim by the defendant is without merit.

The defendant also makes reference to language in Wis. Stats. §971.05 which he asserts a prohibition exists preventing the court that conducts the preliminary examination from being the court that presides over the trial. According to Avery, "clearly the Wisconsin legislature noted that the 'court which conducted the preliminary examination' cannot be the trial (sic) court". Because the statutory language reading "the arraignment may be in the trial court or the court which conducted the preliminary examination or accepted the defendant's waiver of the preliminary examination" uses the conjunction "or" to command that the trial be held in other than the preliminary examination court. The statute clearly permits Judge Willis to do precisely what he did

do. Avery's argument to the contrary is empty and without substance. This court finds that the defendant's allegations that Judge Willis was at any time during these proceeding biased to be unsubstantiated.

In his fifth argument, the defendant argues that his counsel was ineffective because the attorneys failed to make a motion to suppress evidence. The defendant argues that the warrants issued were void for lack of a court seal. In support of his argument, the defendant cites Wis. Stats. § 753.04 and § 753.30. These statutes address writs and the filing of documents generally and have no direct application to search warrants. The defendant offers strained arguments made from unrelated state and federal cases that have no direct application to search warrants. The defendant offers no evidence of record or adequate legal argument to establish how his counsel could have possibly performed deficiently with respect to something that is not required by law.

The defendant then argues that there is no record that a neutral magistrate reviewed the affidavits in support of the warrants issued in this case. The defendant makes the argument that the only record of the issuance of search warrants are the affidavits submitted with the request for the warrant; without a signature of a magistrate *on the affidavit*, the defendant argues that there is no proof of record that a magistrate reviewed the facts submitted in support of the warrant issued.

This argument is completely without merit and borders on frivolous. The individual requesting the warrant, who is familiar with the facts of the case, submits an affidavit to a magistrate for review. That person is swearing to the fact that the information in the affidavit is true. The reviewing magistrate has no personal knowledge of the facts underlying the warrant and cannot offer a sworn affidavit to that effect. The

magistrate signs the warrant, and as part of that signature approving the warrant, finds that probable cause exists to issue the warrant based on the affidavit or testimony submitted. That signature confirms that the magistrate has reviewed the affidavit. The defendant cannot offer any case law or statutory provision in direct and clear support of his argument because it is completely without merit and contrary to Wisconsin's long standing law and procedures for issuing search warrants. The defendant's attempts to strain unrelated statutes and case law to form a sufficient legal basis in support of his argument cannot succeed.

In his next argument, the defendant asserts that his state and federal constitutional rights to effective assistance of counsel were violated by his attorneys' failure to argue that there was a break in the state's chain of custody with respect to the victim's vehicle and the manner in which it was taken into evidence. The defendant offers several federal cases on the issue of chain of custody. However, the defendant only offers four lines of argument regarding how those cases apply to his situation and absolutely no supporting evidence of record to establish how his counsel was deficient in this matter. He offers only conclusory statements with no links to specific items of evidence used in trial. There is a good reason for that omission. No evidence from the victim's car was used against the defendant during his trial. As such, even if the defendant's counsel should have raised an argument regarding chain of custody, there was no resulting harm to the defendant or any effect on the outcome of the trial. Without such harm, no ineffective assistance of counsel could have occurred. Finally, breaks in a chain of evidence go to the weight of the evidence to be considered by jury, not its admissibility at trial. Without any case law or facts of record to support his claims, the defendant's argument must fail.

The defendant next argues that he was denied effective assistance of counsel when his attorneys failed to move for severance of the charge of felon in possession of a firearm. In support of his argument, the defendant quotes one line from a federal case and then copies Wis. Stats. § 971.12, the statute addressing criminal joinder, to his brief. Significantly, the defendant notes that Wisconsin case law leaves severance squarely in the discretion of the trial court. What the court can gather from the two brief paragraphs setting forth the defendant's argument, he seems to object to the fact that he stipulated to being a felon in court and relies on that stipulation as the basis for his ineffective assistance claim.

It is significant that the defendant ignores two very important points when making his argument. The defendant asserts that the stipulation that he was a felon was ineffective assistance of counsel; he does NOT claim that he was labeled a felon in error. Had the defendant not stipulated to the fact that he was a felon, it would have been a simple matter for the prosecution to establish this fact of record. There is no effort made to establish how this sequence of events amounted to ineffective assistance of counsel. Had the defendant never been convicted of a felony, an issue would surely arise. In this case, however, there is no sufficient argument made as to how the decision to stipulate his felony record was ineffective assistance. The defendant seems to argue that the decision of counsel not to demand the record be admitted was an error. If it was an error, it was a harmless one because the defendant was indeed a convicted felon and records could be produced to support that fact. Furthermore, the defendant never clearly informs the court as to how the stipulation affects a motion to sever, the basis for his original assertion of error.

The defendant also conveniently ignores the very standard that he concedes in his brief: it is within the sound discretion of the trial court as to whether charges should be severed. The defendant offers not a single word as to this critical point. There is no evidence or argument establishing how the trial judge erroneously exercised his discretion in this matter. The defendant's counsel never submitted such a motion to this court, and as mentioned above, the defendant's other argument does not adequately address the severance issue in general. This argument is without merit.

The defendant's next argument asserts that his post-conviction counsel was ineffective because they failed to argue that the defendant was entitled to a new trial due to retroactive misjoinder. Once again, the defendant presents very general case law on the subject, but fails to connect it with his own trial record or any other evidence of record. In a short, single paragraph, the defendant argues that the state failed to prove beyond a reasonable doubt that he mutilated the corpse of the victim. That is the sum total of his argument. There is no factual support for his assertion, only his conclusory statements on the matter. Furthermore, the defendant's argument is not even directed to the issue of severance; his statement makes allegations about the sufficiency of the evidence used to convict him. This argument is meritless.

The defendant next argues that he was provided with ineffective assistance of counsel when his attorneys failed to develop an argument regarding planted evidence at the crime scene. Specifically, the defendant asserts that a tire could not have been in the burn barrel and consumed the evidence as asserted by the state. Once again, the defendant offers only conclusory statements about scientific evidentiary issues that should have been addressed at trial. These allegations are not supported by any evidence.

of record or any supporting affidavits from a qualified scientific expert. To assert that the defendant's defense team did not argue that evidence may have been planted by law enforcement in this matter is absurd; the record clearly reflects that the attorneys asserted this argument during the prosecution of this case. The defendant has not established with any admissible evidence how his counsel was deficient or how this deficiency affected the outcome of the trial.

The defendant tenth argument is that he was denied due process when "the court was incompetent to hear an appointed special prosecutor." The defendant cites case law so general that it could apply to many situations before the court; he does not, however, show how these cases apply to the matter at hand. The defendant supplies no case law or legislation to establish why one unsigned oath would cause the court to lose jurisdiction in the matter. Furthermore, the defendant does not establish any prejudice to his case that occurred because the oath was not signed by the special prosecutor. The defendant did not make an objection to the prosecutor acting for the state during his trial. These claims are forfeited pursuant to *In re the Commitment of Bollig*, 222 Wis. 2d 558, 587 N.W.2d 908 (Ct. App. 1998).

In his final argument, the defendant makes several arguments that he was deprived of his Constitutional right to an unbiased jury. The defendant again begins his argument by listing general case law establishing that a criminal defendant has a right to an unbiased jury, an issue which is not contested. The defendant then cites Wis. Stat. § 805.08(1):

1) Qualifications, examination. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has

any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

The defendant first asserts that jurors in Manitowoc County had a presumptive financial interest in the outcome of his trial. At the time of his trial in this matter, the defendant had a multi-million dollar civil suit pending against Manitowoc County. As such, the defendant argues that the jury, as citizens of Manitowoc County, had a financial interest in finding him guilty and damaging his civil case.

As he has done so many times prior in his brief, the defendant offers no evidence to establish that the jurors selected in this case had a direct financial interest in its outcome. At trial, four days were spent on jury selection where extensive voir dire was conducted. Supplemental Juror Questionnaires were submitted to prospective jurors to further screen out those with any biases that would conflict with their ability to decide this case. The defendant himself admits that the county may have had enough insurance to cover any award awarded in the civil case. He only then makes vague assertions regarding some kind of financial impact a verdict would have on the county and how it would have affected all tax payers in general. This is a matter of pure speculation and conjecture. The defendant does not offer any admissible evidence as to how the premiums for the county's insurance would have been affected by a civil verdict or as to how the financial impact of insurance premiums or any uninsured losses would have affected the specific jurors selected to serve in this case. The defense counsel performed

a thorough vetting of the jury as reflected in the record. The defense attorneys then made a strategic decision to go forward with a Manitowoc jury. The defendant presents no evidence of record, other than his conclusory statements, in support of the fact that his trial or appellate counsel performed deficiently with respect to the selection of jury or in failing to argue that the jury selected was biased.

The defendant then turns his argument to four individual jurors. The defendant argues that Juror Wardman was statutorily precluded serving on the jury because he volunteered with the Manitowoc Sheriff's Department and his son was a member of the department. The defendant offers neither an explanation for his assertion of bias nor provides any admissible evidence of record to support his claim. The single paragraph in this section does not even attempt to apply the conclusory assertions of the defendant to the law that he uses to support his argument. The argument is without merit.

The defendant next moves to the juror identified as Mohr. The defendant asserts that this juror was married to the temporary Clerk of Circuit Court for Manitowoc County, called in to assist with the additional workload caused by his trial. The defendant asserts that the State was concerned about retaining this juror for fear of being overturned on appeal because it was speculated that Juror Mohr might learn of information about the criminal case from the Clerk of Court's office. Specifically, the defendant asserts that the Juror Mohr's wife volunteered that she had personal knowledge of a vial of blood found in the Clerk's office. The defendant then speculates as to ethics of Juror Mohr and his wife and the dysfunctional relationship between the parties. He further speculates as to Juror Mohr's feelings about unidentified individuals in the Clerk of Court's office and to the personality traits of those unidentified individuals and their

affect on Juror Mohr. Finally, the defendant then asserts a “birds of a feather” type of argument to speculate as to what Juror Mohr would think at trial.

This argument is completely meritless. The defendant’s entire argument rests on speculation regarding the conduct of unnamed individuals, the specific personality traits of those unnamed individuals and the impact those unnamed individuals would have on the outcome of his trial. These assertions are wildly speculative. It is unclear as to how the defendant expects the court to rule on the conduct, psychology and persuasiveness of mystery individuals. As to the juror’s wife’s statements regarding a vial of blood, this information clearly came out during voir dire. The defendant’s counsel heard all of the statements given by Juror Mohr. Counsel had the opportunity to ask the juror questions. Counsel had the opportunity to strike this juror from the pool. Yet, if the defendant’s arguments are to be believed, the defendant’s counsel argued to keep this juror on the panel over the concerns of the state. The defendant offers absolutely no evidence of record, admissible or not, to establish why, after such extensive examination and argument, counsel was deficient in making what was clearly a strategic decision to retain this juror. The defendant offers no admissible facts to support the fact that this juror was retained in this panel contrary to statutory or constitutional requirements.

Next, the defendant turns to Juror Temme. He asserts that the juror had, several years earlier, worked with the District Attorney’s office. The defendant also asserts that she showed a clear bias towards law enforcement during the voir dire process. He asserts that the defendant testified that she believed law enforcement to be more trustworthy in their statements and unlikely to lie in their testimony.

Again, the defendant makes conclusory statements regarding this juror's ability to serve on this jury. He does not establish with admissible evidence exactly how, having worked in the District Attorney's office years prior, the juror would favor the state in this matter. The Manitowoc District Attorney did not prosecute this case; as the defendant noted in his previous argument, a Special Prosecutor was appointed to prosecute his case. The defendant does not argue any relationship between the special prosecutor and Juror Temme.

Assuming that the defendant's recollections of Juror Temme's testimony in voir dire are correct, he does not offer any supporting affidavits or evidence indicating that Juror Temme could not, as the statute requires, put aside her biases and deliberate only on the evidence presented. He attempts to quote a small portion of the juror's testimony, taken out of context, to undermine the entire voir dire that was conducted with this juror. As previously stated, the voir dire process in this case was extensive and thorough. The defendant has not established by any evidence of record that the strategic decision made by his defense counsel to retain this juror failed to meet the standard of being effective counsel.

Finally, the defendant turns to Juror Nelesen. Once again, without support of record, the defendant attempts to take what he asserts was the testimony of the defendant and use it without context to establish that the juror was unqualified to serve. The defendant asserts that this juror had a bias against the defendant with respect to his right not to testify at trial and a bias toward the honesty of police officers. From what he asserts to be the juror's testimony, the defendant argues that Juror Nelesen demonstrated

that he expected the defense to prove not only innocence, but who the real killer was in this case.

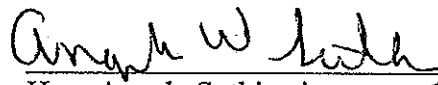
As the court has stated several times already, the defendant does not support his claims with any evidence of record. The defendant repeats what he believes was a segment of the juror's testimony and bases his entire argument on it. He does not indicate how the juror responded to questions on these issues over the course of his voir dire or what the juror's final conclusions were as to his ability to serve within the requirements of the statutes and the constitution. The defendant provides nothing but speculation as to what the juror was thinking as to burden of proof. Unless the juror testified as to what his thoughts were, the defendant's conclusions are mere guesswork. Again, his counsel had the benefit of extensive voir dire and reached the strategic decision that this juror was an acceptable individual for the panel. The defendant offers only allegations and conclusory statements to support his claim. No evidence was submitted with the defendant's motion to support the conclusion that defense counsel was ineffective in reaching the strategic decision to retain this juror.

After filing his original second motion for post-conviction relief, the defendant submitted further supplemental motions to the court, once again, without any explanation as to why they could not have been filed with either of his prior motions. These motions re-argue matters previously submitted and addressed in this and other decisions. These supplemental motions will not be considered further.

FOR THE REASONS SET FORTH ABOVE, THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF IS **DENIED**.

Dated in Sheboygan, WI, this 19th day of November, 2015.

BY THE COURT:



Hon. Angela Sutkiewicz
Sheboygan County Circuit Court

Copies of order mailed
on November 19, 2015 to:

Special Prosecutor Thomas Fallon
Steven Avery