



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Manitowoc County, WI
2005CF000381

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July 13, 2017

The Honorable Angela Sutkiewicz
Sheboygan County Courthouse
615 North 6th Street
Sheboygan, Wisconsin 53081

Re: *State of Wisconsin v. Steven A. Avery*
Manitowoc County Case Number 05-CF-381

Dear Judge Sutkiewicz:

Defendant Steven Avery has filed a motion for postconviction relief pursuant to Wis. Stat. §§ 974.06 and 805.15. The purpose of this letter is to explain why this Court lacks jurisdiction to act on all but three of the claims raised in that motion.

As the Court is aware, Mr. Avery has appealed from the Court's order of November 19, 2015, (signed November 19, 2015; date stamped by Manitowoc County Circuit Court November 23, 2015) denying his *pro se* motion for postconviction relief under Wis. Stat. § 974.06. That appeal remains pending in the court of appeals. The case is now before this Court on remand from the court of appeals pursuant to Wis. Stat. §808.075(5) to allow the Court to decide Mr. Avery's motion for postconviction scientific testing and "any subsequent motion based on the results of further testing, if any, authorized by the circuit court." *See* court of appeals Sept. 8, 2016, order, p. 2 (copy attached).

In his motion for postconviction scientific testing, Mr. Avery sought the Court's permission to conduct:

- 1) "Radiocarbon (14c) testing which could definitively establish the age of Mr. Avery's blood found in the vehicle and determine, based on the age, if the blood was planted." (Testing motion, pp. 13–14);

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- 2) “[N]ew DNA testing on evidence not previously tested (the prop, the battery cable, the interior hood release of the victim’s vehicle, the blinker light, the lug wrench, and the purple thong underwear).” (*Id.*, p. 14);
- 3) “[N]ew and improved DNA testing of previously tested items (the license plates and swabs taken from the victim’s car).” (*Id.*);
- 4) “[T]race testing for the presence of chemicals, solvents, or fibers to determine whether the chemicals or fibers (rubbing) had been used to remove DNA from the victim’s key or hood latch.” (*Id.*);
- 5) RSID (Rapid Stain Identification) testing for “body fluid identification/source attribution testing” of the hood latch and the key. (*Id.*, pp. 16–18);
- 6) DNA testing on the *alleged* human pelvic bones recovered from the quarry property southwest of the salvage yard in order to conduct more advanced DNA testing to determine the origin of these bones. (*Id.*, p. 22).
- 7) DNA testing on burnt material found at the Radandt deer hunting camp west of the Avery salvage yard to determine whether there are any items of evidentiary value at the deer camp. (*Id.*, p. 22).
- 8) DNA methylation testing of various blood stains “if radiocarbon testing fails because of contamination of the evidence samples.” (*Id.*, pp. 32–33);
- 9) Ballistics testing using Neutron Activation Analysis to compare elements of the bullet fragment found in garage to unspent shells found in bedroom. (*Id.*, p. 41);
- 10) A comparison of the fingerprints of Sergeant Andrew Colburn and Lieutenant James Lenk to unidentified prints on victim’s vehicle. (*Id.*, p. 42); and
- 11) Examination of the Motorola Razr phone and box found in the victim’s dining room (*id.*, p. 42).

In an order entered on November 23, 2016, pursuant to a stipulation by the parties, this Court granted Mr. Avery’s request to conduct independent scientific

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testing of nine items. In addition, the State has provided Mr. Avery's counsel with a bullet fragment found in Mr. Avery's garage for scientific testing.

Apparently Mr. Avery has completed testing on these items. But while his motion for postconviction scientific testing asserted that the "additional scientific testing can . . . prove he did not commit the crime for which he has been convicted" (testing motion, p. 1), his 204-page postconviction motion makes scant reference to the results of that testing. The postconviction motion raises more than 25 claims of ineffective assistance of trial counsel (postconviction motion, pp. 50–130); four claims of alleged *Brady* violations (*id.*, pp. 133–36); six claims of newly discovered evidence (*id.*, pp. 136–156); eight claims of alleged ethical violations by one of the prosecutors (*id.*, pp. 164–83); multiple claims of ineffective assistance of postconviction and appellate counsel (*id.*, pp. 185–200); and a request for a new trial in the interest of justice (*id.*, p. 202).

Of that multitude of claims, only three appear to be based on the results of the testing requested in the motion for postconviction scientific testing. The recently filed 204-page postconviction motion alleges: 1) that "newly developed DNA source testing" of a swab of the hood latch demonstrates "that the DNA allegedly discovered on the hood was not the result of Mr. Avery touching the hood latch as he opened the hood" (postconviction motion, p. 155); 2) that DNA source testing shows that that source of Mr. Avery's DNA on the key found in his bedroom was not blood but his skin cells (*id.*, p. 156); and 3) that examination of the bullet fragment found no evidence that the bullet passed through bone (*id.*, p. 144).

Those three claims based on the results of the testing requested in the original motion for postconviction scientific testing are the only claims over which this Court has jurisdiction.

"Once a Notice of Appeal has been filed with the circuit court and the record has been transmitted to the court of appeals, a circuit court's authority is limited." *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶ 18, 351 Wis. 2d 237, 839 N.W.2d 388 (citing Wis. Stat. § 808.075(3)). "An appeal from a judgment or order strips the trial court of jurisdiction with respect to the subject matter of the judgment or order, except in certain unsubstantial and trivial matters,' unless explicit contrary authority is noted in the statutes." *Id.* (citation omitted).

Wisconsin Stat. § 808.075 (permitted court actions pending appeal) identifies the circumstances under which a circuit court may act when an appeal is pending.

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Section 808.075(1) provides that “[i]n any case, whether or not an appeal is pending, the circuit court may act under ss. . . . 805.15.” Mr. Avery has labeled his motion for postconviction relief as being brought under Wis. Stat. § 805.15 as well as under Wis. Stat. § 974.06. But Wis. Stat. § 805.15 does not apply in criminal cases. *See State v. Henley*, 2010 WI 97, ¶¶5, 39, 328 Wis. 2d 544, 787 N.W.2d 350. So Wis. Stat. § 808.075(1) cannot confer authority on this Court to act on any claims Mr. Avery purports to bring under Wis. Stat. § 805.15.

In criminal cases, Wis. Stat. 808.075(4)(g) lists several permitted actions while an appeal is pending. None of those circumstances are applicable here.¹

That leaves Wis. Stat. § 808.075(5), which provides that “[n]otwithstanding the limitations of this section, any party may petition the appellate court for remand to the circuit court for action upon specific issues.” That statute was the basis for the court of appeals’ remand in this case to allow the circuit court to decide Mr. Avery’s motion for postconviction scientific testing and “any subsequent motion based on the results of further testing, if any, authorized by the circuit court.” *See* court of appeals Sept. 8, 2016, order, p. 2

Under the court of appeals’ order, the only motion for postconviction relief that this Court has the authority to entertain is a “motion based on the results of further testing, if any, authorized by the circuit court.” As discussed above, only three of the many claims raised in Mr. Avery’s latest postconviction motion are based on the results of that testing. The Court lacks jurisdiction to act on any of the other claims in the latest postconviction motion.

¹ Wisconsin Stat. § 808.075(4)(g) provides that in a criminal case, the circuit court may act as to the following despite the pendency of an appeal:

1. Release on bond under s. 809.31 or 969.01(2).
2. Modification or revocation of bond under s. 969.01(2)(e) or 969.08.
3. Imposition of sentence upon revocation of probation under s. 973.10(2)(a).
4. Determination of sentence credit under s. 973.155.
5. Modification of a condition of probation or extension of probationary term under s. 973.09(3)(a).
6. Modification of sentence.
7. Commitment, conditional release, recommitment and discharge under s. 971.17 of a person found not guilty by reason of mental disease or defect.

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Therefore, this Court has acted within the bounds of the appellate remand. This Court issued an order based on a stipulation of the parties and granted the motion for postconviction scientific testing. The testing requested has apparently been completed. The Court has done all that it can unless Mr. Avery wishes the Court to address the three items that do relate to the original order. If not, the matter should be returned to the appellate court for further proceedings.

Thank you for your time and attention to this matter.

Sincerely,



Thomas J. Fallon
Assistant Attorney General

TJF:ajs

Enclosure

c. Attorney Kathleen T. Zellner
Lynn Zigmunt, Manitowoc County Clerk of Circuit Court



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September 8, 2016

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You are hereby notified that the Court has entered the following order:

2015AP2489

State of Wisconsin v. Steven A. Avery (L.C. # 2005CF381)

Before Reilly, P.J.

Steven Avery, by counsel, moves the court to stay this appeal pending disposition of a motion filed in the circuit court on August 26, 2016 seeking postconviction scientific testing of evidence. The State does not object to the stay request and suggests remanding the record to the circuit court pursuant to WIS. STAT. § 808.075(5) (2013-14) for the court's use in determining the



pending motion and any subsequent motion based on the results of further testing, if any, authorized by the circuit court. A stay of this appeal and remand of the record are appropriate.

Avery also moves the court to substitute Attorney Steven G. Richards for Attorney Tricia J. Bushnell as local, sponsoring counsel. The motion is granted. Our January 22, 2016 order explained the obligations of sponsoring counsel. Successor sponsoring counsel, Steven G. Richards, must sign every document filed in this court.

Upon the foregoing reasons,

IT IS ORDERED that this appeal is stayed pending further order of this court.

IT IS FURTHER ORDERED that within twenty days after the date the circuit court enters an order disposing of the motion filed in the circuit court on August 26, Steven Avery shall inform the clerk of this court whether (1) WIS. STAT. § 808.075(8) applies to this appeal; (2) whether briefing may commence; or (3) whether there will be additional circuit court proceedings relating to the subject matter of the August 26 motion.

IT IS FURTHER ORDERED that the record on appeal is remanded to the circuit court for the court's use in determining the pending motion and any subsequent motion based on the results of further testing, if any, authorized by the circuit court. WIS. STAT. § 808.075(5).

IT IS FURTHER ORDERED that the motion to substitute local, sponsoring counsel is granted. Attorney Steven G. Richards is now local, sponsoring counsel. Attorney Richards must sign every document filed in this court.

*Diane M. Fremgen
Clerk of Court of Appeals*