

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,

v.

Case No. 2005 CF 381

STEVEN AVERY,

Defendant.

MEMORANDUM DECISION AND ORDER

The defendant, Steven Avery, appearing through his attorneys, Kathleen Zellner and Steven Richards, submitted a motion, pursuant to Wis. Stats. § 974.06, on June 7, 2017. A decision and order denying the defendant's motion was issued by the court on October 3, 2017. Subsequently, the defendant filed a motion for Relief from Judgment on October 6, 2017 and Motion for Reconsideration on October 23, 2017. The defense has filed several supplements to the motion on November 1st, November 2nd, and November 17, 2017. The court has reviewed the motions and subsequent amendments. The court is denying all the requests.

The defendant first submitted a Motion for Relief from Judgment pursuant to Wis. Stats. § 806.07(1)(a). In that motion, the defendant asserts that in September of 2017, the State and the defense reached an agreement allowing for the June, 2017 motion to be amended, for additional scientific testing of evidence and for a hearing in spring 2018.

The defense asked the court for relief from judgment so the agreement could be carried out.

First, the court should note that the defense submitted its primary motion, complete with its supporting documents, on June 7, 2017. No further communication requesting that the court withhold its final decision was submitted for consideration by the defendant. No communication was made to the court indicating that the original motion was incomplete and would be supplemented with further information. Only after the court fully considered the evidence submitted and issued its final ruling did the defense finally alert the court to the fact that it was working on further evidence to support its arguments.

The defendant asserts that there were discussions and agreements made between the defense and the prosecution regarding further testing of evidence and an agreement as to the scheduling of a hearing that the court had yet to grant. Again, the court was not informed of any such negotiations until after the final ruling in this matter had been issued. None of the agreements were submitted to the court for its approval until after the final decision was made in the defendant's original motion. It is for the court, and not the parties, to determine if amendments to motions previously filed will be permitted. Furthermore, it is for the court, and not the parties, to establish scheduling for matters pending before it. While cooperation between parties is to be encouraged, that cooperation and any agreements reached are not binding on the court. Agreements should have been submitted for approval of the court prior to the final decision on the original motion being reached. The defense cannot try to amend a motion that was filed

without reservation only after it receives an adverse ruling. The Motion for Relief from Judgment is denied.

The defendant also filed a Motion for Reconsideration of the court's final decision of October 3, 2017. In its numerous filings after October 6th, the defense submits a substantial amount of what it calls newly discovered evidence. That characterization is incorrect. The defendant chose to submit a motion on June 7, 2017, with, as he asserts, the need for further scientific testing to be done to support claims that he argued in his original motion. In the subsequent documents, the defense outlines new arguments and new theories of the case for the court to consider. What is missing in the wealth of arguments and documentation is any explanation as to why the defendant filed his motion on June 7, 2017, knowing that further scientific testing was required to complete his motion and that considerable investigation was still being conducted by the defense.

In his motion, the defendant discusses *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) at some length. *Escalona-Naranjo* states clearly that all grounds for relief must be raised within the motion unless good cause is shown as to why the issue was not included in the original filing.

In this matter, the defendant submitted his motion before all scientific testing was completed and ready for the consideration of the court. While there may have been good reason as to why the reports were not fully completed in June of 2017, there is no reason asserted or good cause shown as to why the motion was submitted prior to the conclusion of all scientific testing. Knowing that not all the facts were not ready for presentation to the court, and with no deadline for filing his motion set by the court or statute, the defendant proceeded to file the motion prematurely. Furthermore, in its numerous filings,

the defense makes it abundantly clear that it knew that it had substantial investigation to complete before it had a full picture of all the evidence that the court needed to consider. Again, there is no explanation as to why, without an impending deadline to meet, the defense rushed ahead and filed the motion prior to investigation being completed.

The motion was pending before this court for a few months before the court issued its ruling. During that period, the defendant did not ask the court to stay its ruling pending the conclusion of testing, request time to supplement the motion or take any other action requesting that the court delay its final decision in this matter. The motion was submitted to this court and the court ruled on the motion. The defendant has not presented any good cause as to why the court should consider additional testing that was not included in the original motion.

The defendant also asserts that the court committed a manifest error when it did not find the defendant was entitled to an evidentiary hearing on his motion. The defendant correctly states that Wisconsin statutes require that the circuit court hold an evidentiary hearing when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶ 114, 274 Wis. 2d 568, 682 N.W.2d 433. However, if the defendant reviews the decision in the case at bar, the court quoted the defendant's experts, indicating that they could not reach definitive conclusions regarding items of evidence without further testing. Without such conclusions, the reports are speculative and do not present facts that the court must consider. The defendant did not wait for the final tests to be run and conclusive reports to be issued before submitting his motion. The court must accept the allegations in the motion as true only if there are facts of record to support them; the court is not required to accept as fact

the defendant's interpretation of the expert's interim opinions. As such, *Allen* is inapplicable to this matter.

The court does not find that the defendant's interpretations of the facts of this case or his interpretation of legal precedent are correct and finds no basis to reverse its previous decision. Furthermore, a Motion to Reconsider is not the appropriate forum for the court to consider new arguments based on a defendant's additional arguments for a new trial. Such arguments should have been asserted in the defendant's first motion, pursuant to the holding in *Escalona-Naranjo*.

THE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT AND THE MOTION FOR RECONSIDERATION ARE **DENIED**.

Dated this ____ day of November, 2017.

BY THE COURT:

Electronically signed by Angela Sutkiewicz
Hon. Angela W. Sutkiewicz
Sheboygan County Circuit Court
Branch 3
Circuit Court Judge

11/28/2017