STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
v.	)	Case No. 2005-CF-381
	)	
STEVEN A. AVERY,	)	
	)	
Defendant.	)	

MOTION FOR RELIEF FROM JUDGMENT OR ORDER OF OCTOBER 3, 2017, PURSUANT TO WIS. STAT. § 806.07 (1)(a)

NOW COMES DEFENDANT, STEVEN AVERY, by and through his attorneys, Kathleen Zellner and Steven Richards, and for his Motion for Relief from Judgment or Order of October 3, 2017, pursuant to Wis. Stat. 806.07 (1)(a), states as follows:

1) On October 3, 2017, this Court entered an Order dismissing Defendant's Motion for Relief filed on June 7, 2017, pursuant to Wis. Stat. § 974.06. (See Order, attached as Exhibit A).
2) Defendant hereby moves for relief from that order pursuant to Wis. Stat. § 806.07 (1)(a) due to matters pending at the time the order was entered.
3) At the time the order was entered, the parties, through Defendant's Attorney Kathleen Zellner and Assistant Attorney General Thomas Fallon, had an agreement that further testing would take place on certain evidentiary items. The parties also had an agreement that the previously filed § 974.06 Motion For Relief would be amended.
4) On September 18, 2017, in Madison, Wisconsin, the parties reached the aforesaid agreement.
5) Defense Counsels Zellner and Johnson, together with Prosecutors Fallon, Norman Gahn and Mark Williams specifically agreed as follows:

The RAV-4 (Wisconsin State Crime Lab ("WSCL") Item A) would be made available to Defendant's experts Drs. Karl Reich and Christopher Palenik for examination at the Calumet County Sheriff's Department for additional items to test and for collection of swabs from the:

a. Battery cables (swabs previously collected and designated WSCL Items IE and IF);
b. Swabbing the bar under the driver's seat;
c. Swabbing the hood crutch;
d. Swabbing the interior hood release; and
e. A complete examination of the interior and exterior of the RAV-4 for additional forensic evidence.

6) The prosecutors stated that they would schedule the examination the RAV-4 testing in the very near future before the weather worsened.

7) The prosecutors also agreed that Defendant would be allowed to attempt testing of the license plates (WSCL Items AJ and AK) for DNA.

8) The prosecutors also agreed that Defendant would be allowed to test the lug wrench. (WSCL Item A16).

9) The prosecutors agreed that Drs. Steven Symes and Leslie Eisenberg would be able to do a microscopic examination of the pelvic bones (Calumet County tag no. 8675) located in the Manitowoc County gravel pit.

10) The prosecutors and defense counsels also agreed that to streamline the litigation, Defendant would amend the Petition. It was generally agreed as to what claims would be added to and removed from the petition. Additionally, prosecutors and defense counsels agreed that if an evidentiary hearing was necessary to resolve the issues in the amended petition, the evidentiary hearing could last 4 weeks or more. Scheduling was discussed and prosecutors and defense counsels agreed that the

evidentiary hearing could be started in the Spring and could proceed during the Summer to completion.

11) Defense counsel agreed to remove the issues of ethical violations perpetrated by prosecutor Kenneth Kratz (6/7/17 Motion for Post-Conviction Relief, ¶¶ 380-422).

12) Defense counsel also agreed to remove the references to brain fingerprinting test of Steven Avery performed by Dr. Lawrence Farwell (6/7/17 Motion for Post-Conviction Relief, ¶¶ 328-358).

13) Defendant intended to inform the court that an amended motion would be filed so that the dates for a scheduling conference for an evidentiary hearing, if needed, could be set. Defendant did not anticipate the court filing its order prior to the time Defendant could notify the court of the matters set forth herein.

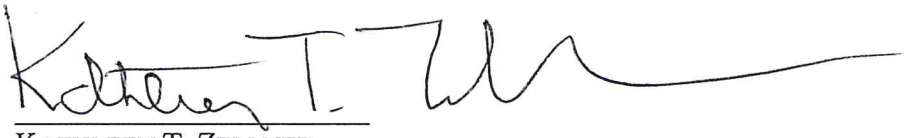
14) On October 6, 2017, defense counsel spoke the prosecutors and informed them that this motion would be filed today to vacate the order. This motion has been presented to and reviewed by the prosecutors and the prosecutors agree to the factual accuracy of the representations regarding the content of the September 18, 2017 meeting made in this motion.

15) The prosecutors stated that they could not join in the motion.

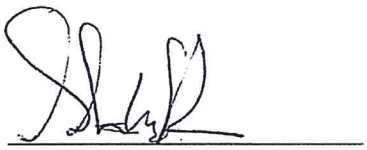
16) Defense counsel submits that justice and finality require that the proposed testing go forward.

17) Defense counsel submits that the Order of October 3, 2017, should be vacated so that the agreed upon testing can take place.

Respectfully Submitted,



KATHLEEN T. ZELLNER
Kathleen T. Zellner & Assoc., P.C.
1901 Butterfield Road
Suite 650
Downers Grove, Illinois 60515
630-955-1212
attorneys@zellnerlawoffices.com



STEVEN G. RICHARDS
Atty No. 1037545
(Local Counsel)
Everson & Richards, LLP
127 Main Street
Casco, Wisconsin 54205
920-837-2653
sgrlaw@yahoo.com

CERTIFICATE OF SERVICE

I certify that on October 6th, 2017, a true and correct copy of Our Motion for Relief from Judgment or Order of October 3rd, 2017, Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished by first-class U.S. Mail, postage prepaid to:

Manitowoc County District Attorney's Office
1010 South 8th Street
3rd Floor, Room 325
Manitowoc, WI 54220

Mr. Thomas J. Fallon
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Kathleen T. Zellner

STATE OF WISCONSIN : CIRCUIT COURT : SHEBOYGAN COUNTY

STATE OF WISCONSIN,

v. Case No. 2005 CF 381

STEVEN AVERY,

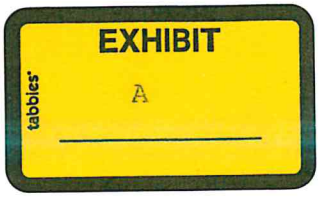
Defendant.

MEMORANDUM DECISION AND ORDER

The defendant, Steven Avery, appearing through his attorneys, Kathleen Zellner and Steven Richards, submitted this motion, pursuant to Wis. Stats. § 974.06. The defendant requests that he be granted a new trial on several grounds.

It is important to remember how this decision came into being. Previously, the defendant filed a motion for relief pursuant to Wis. Stats. § 974.06. The defendant raised numerous claims, including claims of ineffective assistance of counsel against his trial and appellate attorneys, as well as raising doubts as to the discovery of bones in the burn barrel next to his residence and whether a tire was burned in the barrel with the remains. That motion was denied by this court on November 19, 2015.

The defendant appealed the decision to the Court of Appeals. Prior to the Court of Appeals ruling, the defendant filed a motion requesting additional DNA testing on items of evidence introduced at trial. An agreement with the prosecution was reached and the requested evidence was submitted for further testing. After counsel received various reports regarding the testing, the defendant filed a second motion pursuant to



Wis. Stats. § 974.06. In that motion, the defendant asserts numerous grounds for relief, including those previously addressed and denied in the first motion submitted by the defendant pursuant to Wis. Stats. § 974.06.

After filing the second motion for post-conviction relief, the defendant moved the Court of Appeals to dismiss his appeal. That motion was granted on August 24, 2017. The original decision in the first post-conviction motion remains of record.

ANALYSIS

The court has reviewed the second motion brought by the defendant pursuant to Wis. Stats. § 974.06. The defendant offers many arguments regarding new scientific tests that create doubt about the evidence submitted in his criminal trial and alternative theories regarding the case. The defendant also asserts that the police investigation was conducted at a level below professional standards. Additional arguments are offered regarding the competency of the defendant's trial counsel, the ethics of the prosecutor in this matter and Brady violations with respect to evidence not delivered to trial counsel.

The defendant attached numerous reports to his latest motion, arguing that the forensic tests conducted in the reports were not available at the time of the defendant's trial in 2005. However, the defendant's arguments ignore an important question – were the tests available at the time of the defendant's previous motion pursuant to Wis. Stats. § 974.06 or any of the other appeals or motions filed after trial?

In his motion, the defendant asserts that his post-conviction counsel was ineffective for failing to raise these issues in prior motions submitted to the court. A circuit court is not authorized by statute to resolve claims of ineffective assistance of

appellate counsel. *State v. Knight,* 168 Wis. 2d 509, 484 N.W.2d 540 (1992). In this matter, if the defendant wishes to pursue the claims regarding his appellate counsel, the defense may file a *Knight* motion with the Court of Appeals.

The defendant also asserts that his prior *pro se* motion filed under this statute should not preclude this motion being heard. The defendant's *pro se* motion does recognize significant legal issues which the court has previously ruled on. There is no argument or showing of a sufficient reason as to why these issues could not have been raised in prior motions. Without such sufficient reason, these arguments are precluded from any subsequent motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

There are three arguments made by the defendant which stem from the DNA testing permitted by the original order that cover the scope of this motion. The first argument asserts that newly developed DNA source testing demonstrates that the DNA found on the hood latch of the victim's car could not have come from him touching it. The report indicates that 15 people, unidentified by any statistical data, touched the hood latch of a car substantially similar to the one owned by the victim and found on the defendant's lot. Of those individuals, 11 left no trace. As a result, the report concludes that it is highly unlikely that the defendant's touch left the DNA on the hood latch.

This defendant's argument leaves out several significant facts. The author of the report concedes that there is no forensic test available that can conclusively determine whether DNA was left by sweat. As such, the report cannot conclusively state that the DNA on the hood latch could not have been left by the sweat of the defendant's hand. Furthermore, while 11 of the test subjects did not leave detectible DNA on the hood

latch, the fact remains that 4 of the test subjects did leave detectible DNA by touch. The report does not give any quantifiable statistics as to the amount of DNA left in his tests or comparable data to the test performed on the hood latch in question and entered into evidence at trial. Contrary to the defendant's assertions, the test of the DNA on the hood latch does not rule out the defendant's hand as the source of the DNA. In fact, the report declines to make such a conclusion, noting that the matter could become a subject of further, non-DNA, investigation.

The second argument asserts that DNA source testing of the key found in the defendant's trailer establishes that the DNA present could not have been put there by blood or touch. The defendant alleges that the transfer had to come from a DNA rich source, such as a toothbrush. Further, the defendant asserts that the fact that the key found in the search was the victim's subkey further increases the likelihood that the DNA was planted, and not there as a result of the defendant's touch. The defendant further argues that because test results establish that the key did not have the amount of debris on it that would prove that the key was used on a regular basis, and that other evidence shows that the victim used a different key as her primary key, the likelihood of the DNA being planted is substantially higher.

There is no question that the DNA found on the key was the defendant's. Even if the key found in the defendant's residence was the victim's subkey, and that the amount of debris found on the key is not consistent with the key being used on a regular basis, that does not establish that the key was planted. Secondary keys are frequently used when an individual misplaces the primary key. While the key may not have been the key that the victim used on a regular basis, there is no evidence that the key that the victim used

on the day of her murder was not the subkey. Furthermore, the report states that the amount of debris on any key can vary for a number of reasons. While the defendant asserts that someone took his toothbrush and planted the DNA on the subkey, there is no evidence submitted that establishes a break in or the theft of a toothbrush other than the defendant's conclusory allegations.

Finally, the defendant asserts that the bullet produced at trial and alleged to be a bullet used in the murder did not pass through any bone, as it would have if it had entered the victim's skull. Furthermore, the defendant argues that the report proves that the red stain on the bullet was not blood, but paint. Based on those conclusions, the defendant asserts that a key piece of evidence used to convict him was wrongfully introduced as proof of the victim's murder.

The report, however, is not that clear cut. The expert witness indicates that the tests used on the bullet are not inclusive to the point of discovering all particles present on the bullet surface. In order to completely rule anything out, the expert indicates that more detailed analysis would be necessary. Furthermore, the report indicates that the tests performed cannot determine what the red substance on the bullet is. Again, the expert indicates that further testing would be needed to rule blood in or out as the source of the stain. The expert also states that he would want to supplement his report after further test results were available. The reports do not support the defendant's position.

All three items of evidence were admitted at trial. Each was thoroughly contested by defense counsel. The reports submitted by the defendant are equivocal in their conclusions and do not establish an alternate interpretation of the evidence. Given the totality of evidence submitted at trial and the ambiguous conclusions as stated in the

experts' reports, it cannot be said that a reasonable probability exists that a different result would be reached at a new trial based on these reports. As such, the defendant has not met his burden in order to obtain a new trial. *See State v. O'Brien*, 214 Wis. 2d 328, 572 N.W.2d 870 (App. 1997), *review granted*, 217 Wis. 2d 517, 580 N.W.2d 688, *affirmed*, 223 Wis. 2d 303, 588 N.W.2d 8, *reconsideration denied*, 225 Wis. 2d 247, 591 N.W.2d 846, *reconsideration denied*, 225 Wis. 2d 493, 594 N.W.2d 386.

Finally, in light of the discussion of the evidence above and the conclusion with relation to the ability to appeal and venue for an appeal, the defendant has failed to establish any grounds that would trigger the right to a new trial in the interests of justice. As such, no further consideration will be given to this issue.

FOR THE REASONS SET FORTH ABOVE, THE MOTION OF THE DEFENDANT FOR A NEW TRIAL IS **DENIED** IN ITS ENTIRETY.

BY THE COURT:

Electronically signed by Angela Sutkiewicz

Circuit Court Judge

10/03/2017