DRAFTING

STATE OF WISCONSIN CIRCUIT COURT WOOD COUNTY

STATE OF WISCONSIN,
Plaintiff,
V.

Case No. 93CF74

TODD FROST,
Defendant.

Motion to Supplement §974.06

Now comes the above-named defendant, Todd Frost, appearing here pro se, to move this court pursuant to 802.09 (2) (4), permitting him to supplement the original §974.06 motion seeking post conviction relief on the grounds of newly discovered evidence, or new facts regarding the evidence used at trial against defendant have been newly discovered.

§974.06(4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. (App. 100).

The standard for newly discovered evidence is:

(1) The evidence must have come to the moving party's knowledge after a trial; (2) The moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial." State v. Brunton, 203 wis.2d 195, 200; 552 N.W.2d 452, 455 (Ct. App. 1996).

In State v. Edmunds, 308 Wis.2d 374; 746 N.W.2d 590 (Ct. App. 2008), the court of appeals held that once the first four criteria have been established, the court looks to whether a reasonable probability exists that a different result would be reached in a trial. The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof.

1. Police fabricated the evidence used at trial against the defendant.

§974.06 is the proper motion to bring newly-discovered evidence, and supplement to the original §974.06 is the correct procedure since this evidence was not discovered until defendant was seeking evidence to test in connection with the motions before the court now.

Defendant was arrested on 4-2-1993. At that time, with defendant's consent, police seized all of defendant's clothing, including his shoes, size 10½. Police also took

samples of defendant's blood, hair, saliva and other biological samples. Police did not provide defendant with a receipt, nor do any subsequent police, lab, court exhibit list, trial testimony, or other document detail the size shoe seized by police and used at trial against defendant. (App. 101-).

The evidence, specifically defendant's blood and shoes, have remained in exclusive control of the state at all times from the moment of its seizure by police. In fact, these items remained in direct police control at the police station in Wisconsin Rapids for approximately two weeks prior to their transport to the state crime lab. While the various police, laboratory and evidence reports were provided to defense as discovery, the omission of shoe size from these reports prevented defendant from discovering that the shoes given to the crime lab by police Detective Bruce Smolarek as "defendant's shoes" were not in fact the defendant's shoes, and omission of the shoe size of "exhibit 10" has now become critically relevant.

Upon learning about new advances in DNA technology, defendant contacted the Wisconsin Innocence project to have the evidence tested, only to discover that the police had destroyed the only evidence that could conclusively exonerate the defendant. On 4-11-2014, defendant, pro se, filed the current §974.06 motion before this court, on the grounds that the state destroyed exculpatory evidence, suppression of exculpatory evidence, ineffective counsel for failing to test and investigate evidence and other issues. It was in connection with this motion, and a subsequent §974.07 motion for DNA testing, that defendant discovered that the shoes in possession of the state were in fact size 9½, a size shoe the defendant has not worn since age 12 or 13, and therefore, could not possibly have belonged to the defendant.

During the hearing on October 20th, 2015, the court stated that it would only consider, based upon defendant's §974.06 motion, the very narrow issue of destruction of biological evidence, and denied defendant all witnesses, despite the fact that evidence fabricated by the police is proof of their bad faith. As the state has repeatedly pointed out, the burden is on defendant. The majority of that burden, if the court does not find that the destroyed evidence was clearly exculpatory, is to prove that the state acted in bad faith. Evidence fabricated by the state is clear proof of bad faith. If the court refuses to allow defendant to bring this proof of fabricated evidence in the context of proving bad faith, then defendant requests the court to accept this supplement to his §974.06 motion as newly discovered information regarding the evidence used against the defendant at trial, specifically the shoe size, was only discovered while seeking evidence to test in connection with these motions before the court and meets all criteria for newly discovered evidence. That this evidence has not been discovered until now, only speaks to the scope of the state's efforts to conceal their actions; particularly their actions in destroying the only evidence which would have conclusively exonerated the defendant, the type 1 semen. Attorneys for defense filed motions for discovery and inspection on 5-6-1993. That the state did not disclose this to the defense violates the Discovery and inspection rules in Wisconsin.

shoes he received from Smolarek. (R.678: 3-8; App.). Therefore it stands to reason that the footprints Spadafora testified to as possibly matching the shoes received from Smolarek were size 9½, and could not possibly have been made by defendant's shoes since defendant couldn't get his feet into shoes that small.

On October 20th, 2015, a hearing was held before this court during which Detective Lt. Julie Buerger of the Wisconsin Rapids Police Department was the sole witness allowed. As the state pointed out, the burden is on the defense, yet defendant was not allowed to call any witnesses – as requested in writing to the court and DA. Linda Frost purchased a pair of size 10 shoes for defendant for trial. That size shoe was too small and had to be returned for a size 10½. At age 14, defendant gave a pair of brand new size 9½ shoes to Brent Frost because defendant could not even get his feet into them, but Brent was unable to fit the shoes also. Defendant then gave the shoes to David Fischer. Further, defendant enlisted into the United States Navy at age 17, in 1988. His service records from that time will show that defendant wore a size 10½ shoe. Defendant's prison records will show that he has worn size 10½ shoes from the moment of his incarceration, which began immediately after sentencing.

This information is newly-discovered. It is evidence of fraud upon the court, bad faith/official animus by the state, it impeaches all of the state's evidence presented at trial against the defendant, and most certainly, had it been revealed to the defense prior to, or even at trial when defendant asked, would have changed the outcome of the proceedings, as well as the defense strategy. Further, fraud upon the court vitiates the entire proceedings and judgment of the court, and therefore the ruling in this case has never become final. At least from the point where police fabricated the evidence against the defendant, everything from then on is void. Before the court can rule against a motion to supplement, a hearing must be held at which defendant be allowed to present witness testimony and other evidence in support of these issues, up to and including trying on the shoes if necessary, in order to prove that the shoes could not have belonged to defendant.

"A new trial must be ordered when: (1) The four factors of newly-discovered evidence are established; (2) a court determines that had a jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. State v. Krieger, 163 Wis.2d 241, 471 N.W.2d 599.

2. Prosecution used false expert testimony at trial against defendant.

At trial, FBI agent/expert John Mertens falsely testified to obtaining a match on every previously determined inconclusive DNA test result. The FBI expert falsely testified to facts not admitted into evidence when questioned by jurors in order to support his false testimony.

The FBI Laboratory reports on DNA listed test results as inconclusive, yet at trial the expert testified that those same test results were a match on some probes. There was no testimony regarding how many probes actually constituted a match or conclusive result, nor were there any statistics provided for the jury to consider. The state's DNA

expert, John Mertens, testified to obtaining a match on nearly every inconclusive DNA test result, and otherwise unfairly prejudiced the jury against defendant with misleading statements, and also contaminated the state's other expert on blood evidence issues, Sherry Culhane. While some courts have held that the absence of, or failure to provide statistics has not been unfairly prejudicial, in the totality of this circumstance, when the expert claims a match on inconclusive results, or a number of probes less than that required for a conclusive match, the absence of statistics is unfairly prejudicial as it gives nothing for the jury to consider and compare the likelihood that the result is from a given source.

The fact that no individual has a unique DNA profile at any given locus cannot be overstated. Only an individual's DNA taken as a whole is unique. Thus, the importance of DNA profiling lies in its ability to compare as many loci as possible between two samples, and if they appear to match, to calculate the probability that this match could be a coincidence. There are no standards in the scientific community for such calculations, since diagnostic research does not require this step. The methods used to determine the probability statistics are likely to remain hotly contested, since it is the statistical probability of a match which a jury must consider to determine if the sample found at the scene is indeed the defendant's. (42 Stan. L. Rev. 465,488).

At R. 608: 7-13, the expert stated that he matched 3 out of 4 probes, the 4th was inconclusive due to laboratory standards, "... but was not an exclusion by any means. I simply did not include it in my matching of the DNA profile between the questioned and known samples." Without the statistics, this testimony, and other such testimony of a "match" on any number of probes less than that required for a conclusive match, is unfairly prejudicial.

As an example, at R.606:5-10, the expert claimed a match on 2 probes.

"I was able to develop a DNA profile on two probes that we use ... I was able to determine that that was a match to DNA profiles that I developed from the victim..."

This is also unfairly prejudicial as it would lead a juror to conclude that the victim was the source of this sample, yet there is no way to know that from an inconclusive sample. This would lead a juror to give less weight to evidence consistent with the PGM type 1 semen sample when the source of both samples was that of the person responsible for the murder.

At R.607:22-25/608:1-13, the expert claimed a match on 3 probes, yet that test was declared inconclusive. However, the way the testimony was given was proprosecution and misleading. It would give the jury, the idea that this result was actually a conclusive match, and they would give this evidence more weight. This begs the question: How can this match at 3 probes be declared inconclusive, yet the other results at two or three probes be declared a match? It is clear that the FBI testimony was given in a way to benefit the prosecution.

Of interest to the court, the FBI recently stated in a press release that due to flawed DNA testing, testimony, analysis and other errors, it is reviewing cases submitted to the FBI laboratory prior to December 31st, 1999. (App. 100-103). The FBI further stated:

"Twenty-six of 28 FBI agent/analysts provided either testimony with erroneous statements or submitted laboratory reports with erroneous statements..."

"These findings confirm that FBI analysts committed widespread, systematic error, grossly exaggerating the significance of their data under oath with the consequence of unfairly bolstering the prosecutions' case.... This epic miscarriage of justice calls for a rigorous review ... it will be many months before we can know how many people were wrongly convicted based on this flawed evidence..."

"In light of these findings, the department of justice and FBI have committed to working with the innocence project and NACDL to take the following steps:

...Strongly encourage the states to conduct their own independent reviews... (App. 102).

The flaws now being reviewed by the FBI, NACDL, DOJ, and the Innocence Project are not confined to only hair analysis. The Innocence project deals with the issue of viability of old evidence daily, perhaps more so than an actual laboratory, and are recognized experts in this area, yet there was no consultation by the state with any of these agencies regarding viability of DNA evidence. The state was the only one allowed to call witnesses.

"6th amendment to have compulsory process for obtaining witnesses is applicable through 14th amendment." Washington v. Texas, 87 S.Ct. 192.

The FBI performed DNA testing in this case in 1993. The state, through its FBI witness, admitted inconclusive DNA test results as being conclusive at trial, and other flawed expert testimony. It further appears from the press release that age of evidence is not an issue. As the FBI press release states:

"The FBI welcomes assistance in identifying cases... particularly those that occurred before 1982." (App. 100), which again contradicts the state's and Det. Buerger's claims that the evidence is no longer viable.

DNA testing in this case was performed by the FBI in 1993. Since that time new processes and techniques in DNA science, "Touch DNA", for example, have enabled scientists to obtain and test DNA in cases much older than the case at bar. As the court can see from the photographs of remaining evidence, exhibit 14/item BY, the yellow blanket, clearly shows blood stains, and a plastic bag containing hair from the yellow blanket (App. 103-105). Certainly these items, as well as exhibit 10, the shoes (size 9½) allegedly belonging to defendant, would remain viable for examination of DNA. However, that is a conclusion that must be reached by a lab.

The hair samples and shoes in this case were not tested, and may possibly be the only remaining evidence available to provide exculpatory DNA, and proof that the state fabricated the evidence in this case, in light of the state's destruction of evidence. These are issues being reviewed by the innocence projects' – Paul Cates, and others listed in the FBI press release. (App. 101).

As a side issue to this, during the October 20th, 2015, hearing, defendant presented the newly discovered issue that the state actually fabricated the evidence in this case, as the shoes (9½) reported to be the defendant's (10½) were actually too small to be the defendant's. There needs to be discussion on what type of evidence the experts would look for.

The state had this evidence in its direct control and possession for two (2) weeks prior to delivering it to the crime lab. With the newly-discovered issue of the shoes being too small to actually be the defendant's, the integrity of all evidence is now in question. It stands to reason that evidence fabricated by the state would tend to produce test results it was fabricated to produce. Per Wis Stats §974.07 (2) (c), Defendant is entitled to have this remaining evidence examined and tested by a qualified laboratory or other expert as determined by the court, as it contains viable exculpatory DNA evidence.

§974.07 (2) (c) states in part:

"It may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results."

The court allowed appointed counsel to withdraw without defendant being heard on the issue. In its appointment of counsel, the court did so in the belief that counsel was required. Defendant is now pro se, and without access to basic materials necessary to conduct a defense, such as a phone to discuss evidentiary issues with experts, addresses to find experts, etc... the very things an attorney does on a client's behalf, and the defendant must be provided an opportunity to consult an expert, or persons reviewing the evidence in this case, and the court must facilitate that finding and consultation, or order the state to do so, now that defendant has no attorney and is confined to a cage.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See Grannis v. Ordean, 234 U.S. 385, 394 (1914).

The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary processes itself" has been rendered "presumptively unreliable." Cronic, 466 U.S. at 493-496.

A detective may testify to issues within their experience or field of expertise. Such as evidence they collected, security of an evidence room, chain of evidence - if that evidence was within their custody, an inventory of remaining evidence, conditions of storage and other such issues, but not viability of DNA for testing.

As submitted with my "rebuttal on viability" (App. 100-102), in particular, the FBI is seeking cases prior to 1982. This was approximately 5 years before the use of DNA evidence in criminal trials in the United States, and long before anyone knew the proper storage of DNA and other biological evidence. This directly contradicts Det. Buerger's testimony that the evidence is no longer viable for testing, as well as the state's and this court's reliance upon that testimony, and any conclusions drawn there from. The FBI performed the testing in this case, and it is the FBI that is seeking to review cases much older than the case at bar.

§974.07 (2) (c), (6) grants a defendant the statutory right to conduct testing upon evidence used at trial that is in custody of the state. Since I am not seeking testing at the public's expense, I am not required to meet the heightened standard as stated in §974.07 (7), State v. Moran, 284 Wis.2d 24, 700 N.W.2d 884.

However, this once again raises the issue of counsel. This court appointed counsel in the belief that counsel was necessary. While a defendant does not have a constitutional right to appointed counsel on subsequent post conviction motions, the appointment of counsel by the court created a right and expectation to counsel in this proceeding which is protected under the 5th, 6th, and 14th U.S. Constitutional amendments, and that is the right to effective counsel.

A criminal defendant is entitled to and ensured the right to effective assistance of counsel by article I, sections 7 and 8 of the Wisconsin Constitution, and the 6th and the 14th amendments of the United States constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052; State v. Pitsch, 124 wis.2d 628, 329 N.W.2d 711, 714 (1985).

The court then allowed counsel to withdraw without affording me any opportunity to be heard on the issue, or to dispute counsel's claims. This is contrary to Anders v. California, 386 U.S. 738. Just because counsel told the court that I wished him to withdraw does not make it a fact. The court ordered a hearing on the withdrawal of counsel. I received no notice of this hearing, and the letter from the court, which arrived after the hearing, informed me of the fact that counsel was allowed to withdraw. §971.04 (1) (h) states that when the court orders it, a defendant is to be present. Apparently the court ordered me to attend the hearing by telephone, and I was denied that opportunity.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See Grannis v. Ordean, 234 U.S. 385, 394 (1914).

The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary processes itself" has been rendered "presumptively unreliable." United States v. Cronic, 466 U.S. at 493-496.

Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, holds that when a state court allows appellate counsel to withdraw without an independent judicial determination of the appeal's merit, the defendant is entitled to a fresh appeal without first demonstrating that initial appeal was non-frivolous. Jumping ship is a form of abandonment, and a defendant abandoned by his lawyer has suffered injury from that very fact – from the loss of advocacy services that could have been used to establish a non-frivolous issue for appeal. See Anders v. California, 386 U.S. 738, Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746.

"There is a definite presumption against finding a waiver of a defendant's sixth amendment right to counsel. Such a waiver must be an intentional relinquishment or abandonment of a known right or privilege. In faithful adherence to that principle, seventh circuit case law maintains that courts must indulge every reasonable presumption against the loss of constitutional rights." Page v. Frank, 343 F.3d 901 (2003).

Defendant has not yet had the opportunity to be heard on the issue of counsel and therefore this issue has not been properly addressed or settled. Therefore, a hearing on the issue of counsel must be held.

I specifically requested counsel to obtain an inventory of the evidence remaining in state custody, which has lead to the discovery that the shoes could not have been mine. I requested counsel to obtain DNA testing/file a motion for testing, and also requested counsel to contact a laboratory for DNA testing. He refused to do any of these and other things. Attorney Zell informed me that he would not do it; the court would not allow him to do it. He was appointed by the court only to review the very narrow issue of the destruction of biological evidence. It is the court, then, that has prevented appointed counsel form performing the duties owed a client. Or so claims attorney Zell.

It has now been newly-discovered that the state (or police officers) fabricated the evidence used at trial against me (at the very least the shoes) and that the state used false expert testimony at trial, and that the expert testified to facts not admitted into evidence.

The state's DNA expert, John Mertens, testified to obtaining a match on nearly every inconclusive DNA test result, and otherwise unfairly prejudiced the jury against defendant with misleading statements, and also contaminated the state's other expert on blood evidence issues, Sherry Culhane. FBI Laboratory reports on DNA listed test results as inconclusive, yet at trial the expert testified that those same test results were a match on some probes. There was no testimony regarding how many probes actually constituted a match or conclusive result, nor were there any statistics provided for the jury to consider. While courts have held that the absence of, or failure to provide statistics has not been unfairly prejudicial, in the totality of this circumstance, when the expert claims a match on inconclusive results, or a number of probes less than that required for a conclusive match, the absence of statistics is unfairly prejudicial as it gives nothing for the jury to consider and compare the likelihood that the result is from a given source. As an example, at R. 608: 7-13, the expert stated that he matched 3 out of 4 probes, the 4th was inconclusive due to laboratory standards, "... but was not an exclusion by any means. I simply did not include it in my matching of the DNA profile between the questioned and known samples." Without the statistics, this testimony, and

Understanding one's options is an essential ingredient of waiver when the right at stake is counsel.

I am confined in the Wisconsin "Supermax" prison, renamed the "Wisconsin Secure Program Facility" (WSPF) by virtue of litigation. I have no access to a phone, phone books, addresses, expert witnesses, labs, or the other items or witnesses required to adequately present these issues. In fact, a lab such as Cellmark refuses to even speak or consult with me without an attorney, and I am unable to even consult an expert. Further, an attorney should be required to prepare a supplement to the original §974.06 to properly bring these issues before the court. These issues should include, but not be limited to:

1. False expert testimony;
2. Fabrication of evidence by the state;
3. Withholding evidence;
4. Ineffective counsel;.

And any other issues that may be appropriate. The state should be allowed time to respond, then I should be allowed the reply, per §974.06. At the very minimum I should be allowed ample time to prepare a supplement, given the restrictions imposed upon me.

However, the issue of viability has not been settled, nor has the issue of counsel. Counsel must be reappointed and, if necessary, a hearing must be held to determine counsel's duties. State v. Machner, 92 Wis.2d797, 285 N.W.2d 905, 908 (1979). I have shown the need for further hearings on these issues, the need for counsel, the need and right for testing, and the need for a supplement of the original motion.

Courts must liberally construe pro se petitions. U.S. v. Seesing, 234 F.3d 456; McBride v. Deer, 240 F.3d 1287; Hohn V. U.S. 262 F.3d 811; Aron V. U.S. 291 F.3d 708; Urbina v. Thomas, 270 F.3d 292; Haines v. Kerner, 404

Enclosed is also a copy for Mr. Lambert.

Dated this 3rd, day of December, 2015.

Sincerely,

Todd Frost #236133
Defendant pro se
WSPF
P.O. Box 9900
Boscobel, WI 53805-0901

FILED

Todd Frost #236133
WSPF
P.O. Box 9900
Boscobel, WI 53805-0901

12–7– 15

Judge Brazeau
P.O. Box 8095
Wis. Rapids, WI 54494

RE: State v. Frost Case No 93CF74

Judge:

The purpose of this letter is to clarify the record. In my previous letter dated 12-3-2015, I did not fully explain that I objected to the state's use of Detective Julie Buerger as an expert witness on the issue of viability of DNA for testing due to the fact that you ordered me not to speak 'til the state finished.

During the Oct. 20th hearing, I attempted to make a timely objection; however, the Court ordered that I sit mute while Mr. Lambert completed his direct examination of his witness. This is why I had to file the "rebuttal on viability" and then write the letter dated 12-3-15 in response to Mr. Lambert's letter.

Also, you told me at the conclusion of the Oct. 20th hearing that if I had any difficulties obtaining library time to write to you. I've previously done so without response. I am currently allowed up to 3 days / hours per week, yet I receive two hours per week at best. With an order from the court I will receive 3 days at most. Without a written order I am lucky to receive 2 days. I need time. I have not received a response from you on my motion for time, and I am just checking to be sure that legal mail has not been delivered.

Another issue, you previously told me that if I had issues obtaining copies I could send it to you and you'd provide that state a copy. Judge, I get $3 every other week ($6 a month). From this I have to buy toothpaste, soap, etc... and each stamp costs .67 each, not including extra postage for anything over 1 oz. Every page I copy cost 15 cents. When I sent you the motion for extension of time, you returned it as ex parte due to the fact that I did not include a copy for Mr. Lambert. I request that I be allowed to file 1 copy from here on out. Or, in an alternative, the prisons do use e-filing for some courts, and I ask that I be allowed to e-file all letters, motions and briefs.

Enclosed is also a copy for Mr. Lambert.
Dated this 28th, day of December, 2015.

Sincerely,

Todd Frost #236133
Defendant pro se
WSPF
P.O. Box 9900
Boscobel, WI 53805-0901