COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3676

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE MAREK,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Dale Marek appeals from orders denying his motions for postconviction inspection and scientific testing of a detective's memo book entries, following his convictions for three counts of second-degree sexual assault. Marek sought to examine and test the ink of a particular entry in the memo book and compare it to the ink used in other entries in the memo book. He

argues that an ink comparison might provide evidence that the detective lied at trial to bolster the credibility of the sexual-assault victim. We affirm.

BACKGROUND

On April 26, 1994, Dale Marek was charged with three counts of second-degree sexual assault, in violation of § 940.225(2)(d), STATS., 1993-94.[1] The complainant, Allen H., the stepson of Marek's friend, claimed that Marek sexually assaulted him three times in the early hours of April 16, 1994. Marek denied these allegations, but admitted that he did share Allen's bed that night.

Trial evidence established that sometime after 11:00 p.m. on Friday, April 15, 1994, Marek arrived at the Milwaukee home of his longtime friend, Gregory D., the stepfather of Allen. Gregory testified that upon Marek's arrival, he and Marek drank a few beers and that at approximately 2:00 a.m., he told Marek that he was going to bed, but that Marek was welcome to sleep on the couch or in the vacant bedroom of his stepdaughter. He then went to bed, leaving Marek in the living room.

According to Allen, on the night in question, he, his friend Christopher S. and his younger brother Mikey slept in bunk beds in the same bedroom. Mikey slept on the top bunk; Allen and Christopher shared the bottom,

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[1] Section 940.225(2)(d), STATS., 1993-94, provides:

> **940.225 Sexual assault.** . . .
> . . . .
>
> **(2)** SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:
> . . . .
> (d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

"double-size" bunk. Allen said he went to bed between 10:30 and 11:00 p.m. Allen testified that sometime later that night, he was awakened by Marek when Marek sat down on his bed and scooted him over so that he could join the two boys in the bottom bunk bed. Allen explained that when Marek entered the bed, Christopher moved closer to the wall, he (Allen) occupied the middle of the bed, and Marek was on the outside edge of the bed, closest to the bedroom door.

Allen said he subsequently woke up to find his underwear "pulled down in front" and Marek "sucking" on his penis. Allen said he was scared and did not know what to do, so he rolled over onto his stomach and made a groaning noise "to get Marek off [him]." Allen said he then fell back to sleep but awoke again to find Marek's hand in his underwear. Again, Allen moved away from Marek, and went back to sleep. Allen testified that he was awakened a third time by Marek, who was rubbing his (Allen's) penis. Allen said he rolled away from Marek, and then climbed out of bed and went to the living room, where he spent the rest of the night.

Allen testified that when he awakened later that Saturday morning, his mother had left for work, and Christopher was also gone, presumably to a driver's education class. Allen said that when he reentered his bedroom, he found Marek awake and wrestling with Mikey.

Allen stated that later that same morning he went "practice driving" alone with Marek in Marek's car. He said he did not talk to Marek about the sexual abuse that had occurred the previous night because he was "scared" and "just wanted to put it behind [him]." Allen also testified that he did not report the assaults for eight days, finally disclosing them to a school security guard with

whom he had developed a rapport. Allen was then interviewed by City of Milwaukee Police Detective Michael Carlson.

Detective Carlson interviewed Allen on April 25, 1994. According to Detective Carlson's type-written police report, Allen said he and his friend Christopher went practice driving with Marek on the morning after the assaults. Detective Carlson's report provided:

> [Allen] states that the suspect subsequently asked him and friend Chris if they would like to drive his car and they both agreed and they left for a couple of hours while they were riding around the city of Milwaukee and driving the suspect's car.

At trial, however, Allen testified that he did not tell Detective Carlson that Christopher went along with him and Marek. Detective Carlson testified that upon reviewing his memo book, he realized that in preparing his typed report, he might have misinterpreted his memo book notes.[2] Detective Carlson conceded that he had failed to clarify the pronoun "they," and that he might have erroneously assumed what Allen meant by his use of the word.[3]

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[2] The memo book entry in question provides: "[Allen] states Dale took him out driving after they got up. Dale suggested it." Marek concedes that defense counsel received photocopies of the pages from Detective Carlson's memo book sometime during his trial; from the record, however, it is unclear precisely when the photocopies were provided to the defense.

[3] Defense counsel elicited:

> Q In fact, in your report you have Chris going with Allen and Mr. Marek driving around town?
> A That's correct.
> [DEFENSE COUNSEL]: I have nothing else. Thank you.
>
> REDIRECT EXAMINATION
>
> BY [THE PROSECUTOR]:
> Q Detective, I think we need to clarify why your report has both Chris and Allen riding around town with Dale. You spoke with Allen. Allen told you what about driving with Dale, in what sequence?

(continued)

On June 23, 1994, following the three-day trial, the jury convicted Marek of three counts of second-degree sexual assault as charged in the information. Following sentencing, Marek pursued postconviction relief and a direct appeal, claiming he was denied effective assistance of counsel and requesting a new trial in the interests of justice. This court summarily affirmed his conviction. *See* ***State v. Marek***, No. 95-2957-CR, unpublished slip op. (Wis. Ct. App. July 23, 1996), *petition for review denied*.

A The driving part came up near the end of the interview, and it was after he said he had saw [sic] Chris and Dale still in the bedroom, and then in turn after they got up, Allen asked or Dale asked them if they wanted to go driving and they left. I took the word "they" to mean the three of them. I didn't clarify it with him.

Q But your memo book specifically states Dale took him out driving after they got up.

A Yes.

Q And it got put in your typed report as "they went driving" based upon an erroneous assumption on your part?

A Correct.

. . . .

RECROSS EXAMINATION

BY [DEFENSE COUNSEL]

Q In your notes you indicate that you assumed when he said, "after they got up," he meant the three of them, right?

A Yes.

Q And his words, at least at that time, were that after they got up, after we got up I guess if I'm speaking in Allen's voice.

A I'm not sure if he said they or we. I have it in my notes that after they got up. I don't know if it's his term or my term.

Q So based upon your recollection today, it could be either one, that he either said after the three of them got up or after Dale and Chris got up?

A My impression at the time was that it was the three of them.

On October 17, 1997, Marek filed a motion for postconviction production of evidence, alleging newly discovered evidence, ineffective assistance of counsel, and due process violations because of Detective Carlson's testimony. Marek asserted that Detective Carlson altered an entry in his memo book and lied at trial. Marek moved for an order compelling the State to produce the detective's memo book for inspection and scientific testing of the ink to determine whether the notation about "going driving" was made contemporaneously with the other notations. In his motion, Marek alleged:

> 10. A review of the [photocopy of the] memo book entry demonstrates that the portion of the entry referenced by Det. Carlson at trial is significantly different from the remainder of the entry in terms of its language, and likewise is totally out of chronological order. . . .
>
> 11. These discrepancies suggest to counsel for Mr. Marek that the referenced portion of the entry was added after the remainder of the entry, and indeed, *after* Det. Carlson's police report was dictated. . . .
>
> . . . .
>
> 16. . . . Mr. Marek respectfully submits, therefore, that there is ample reason to believe that inspection and scientific testing of Det. Carlson's memo book entries . . . may result in unqualified evidence that the entry was altered and that Det. Carlson then perjured himself at Marek's trial. . . .

The circuit court denied Marek's request, concluding:

> Whether or not the victim "went driving" with the defendant alone or in the company of a friend is not terribly significant to the evaluation of whether he is telling the truth about the assaults. What is significant is that he went driving at all, … it is slightly worse for the prosecution that [the victim] went driving with Marek alone, but that is what he testified to under oath. Marek's own testimony was consistent with [the victim's] in this regard.
>
> The prosecution and defense were in agreement, therefore, that the two went driving alone, without the friend; there was only disagreement over what sort of inference should be drawn from that undisputed fact.

> Whether [the victim] actually told the detective that the friend went along (which would have differed from his trial testimony), whether the detective simply misunderstood what [the victim] was telling him on the subject (which is what he testified to) or whether the detective modified his memo book notes to conform to the victim's testimony has no bearing on the effect of this entire "driving" episode on the ultimate issue of whether sexual assault did or did not occur. It is clear that the jurors who decided this case had the "driving" evidence before them in undisputed form, and gave it the weight they thought it deserved. Under these circumstances, therefore, a new trial at which forensic evidence of an allegedly altered memo book might be admitted has no likelihood of producing a different result.

Marek now appeals.

ANALYSIS

Citing ***State v. O'Brien***, 214 Wis.2d 327, 572 N.W.2d 870 (Ct. App. 1997) (***O'Brien I***), *aff'd*, ___ Wis.2d ___, 588 N.W.2d 8 (1999) (***O'Brien II***), Marek argues that due process requires that he obtain postconviction discovery of the detective's memo book. We disagree.

Subsequent to the briefing in this appeal, the supreme court affirmed this court's decision in ***O'Brien I*** and held "that a criminal defendant has a right to post-conviction discovery when the sought-after evidence would be relevant to an issue of consequence, but this remedy should not be extended to a case . . . where the evidence would not create a reasonable probability of a different outcome." ***O'Brien II***, ___ Wis.2d at ____, 588 N.W.2d at 11. The supreme court explained:

> It is well-established that under the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense. In fact, this court in ***State v. Hicks***, 202 Wis.2d 150, 172, 549 N.W.2d 435, [444] (1996), recognized, albeit inferentially, the right of a defendant to utilize post-conviction discovery when the evaluation is of evidence that is "critical, relevant, and material."

> "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial. "The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish '[a consequential fact]' in the constitutional sense."
>
> Based on the above-stated principles, we conclude that a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence. *Nevertheless, we decline, at this time, to adopt the guidelines as created by the court of appeals. Rather, we believe that a determination whether the evidence is of consequence to the case will limit the remedy of post-conviction discovery to only those situations where it is warranted.*

O'Brien II, ___ Wis.2d at ____, 588 N.W.2d at 15-16 (citations and footnote omitted; first alteration added; emphasis added).

In the instant case, the circuit court essentially concluded that the alleged alteration of the memo book was not "of consequence." "We will not disturb a circuit court's findings regarding evidentiary facts unless they are clearly erroneous." ***O'Brien II***, ___ Wis.2d at ___, 588 N.W.2d at 16. Here, we conclude that the circuit court's findings were not clearly erroneous.

Even if forensic testing would establish that the notation in the detective's memo book was made sometime after the other notes from the interview, no basis exists for a new trial. First, ink variations in the memo book would not establish that Detective Carlson testified falsely. (Indeed, ink consistency would not establish that Detective Carlson testified truthfully.) At best, such variations might support an inference that the entries were made at

different times.[4] Second, even assuming, *arguendo*, that ink variations in the memo book would undermine Detective Carlson's credibility, such evidence would not show that Allen made false statements to the police or at trial. As noted, Allen testified that he told the police that he alone went driving with Marek on the morning after the assaults. Although the typed police report indicates that Allen said he and his friend went driving with Marek, Detective Carlson testified that this might have been a misunderstanding on his part.

While Marek claims that any evidence which supports his theory that Detective Carlson lied in order to bolster Allen's credibility is relevant and material to the jury's determination, the State effectively responds:

> At worst, the fact that Allen's testimony differs from the typed police report would present a credibility dispute between Allen and Detective Carlson, and ink variations in the memo book would suggest that it was the detective who was less credible. In fact, it is highly questionable whether evidence of ink variations in the detective's memo book would even be admissible for purposes of attacking Allen's credibility. It would constitute extrinsic evidence of impeachment on a "collateral" matter, having no direct bearing on Allen's allegations of sexual assault.[5]

(Footnote added.) We agree. Regardless of what the ink testing of the memo book would show, no reasonable probability exists that had such evidence been available at trial, the outcome of the trial would have been different. The evidence

[4] We note that neither the prosecutor nor defense counsel asked Detective Carlson whether he made all of his memo book entries at the time of the interview or whether he used the same pen for each entry.

[5] "[E]xtrinsic evidence [is] testimony obtained by calling additional witnesses, as opposed to evidence obtained by the cross-examination of a witness." ***State v. Sonnenberg***, 117 Wis.2d 159, 168, 344 N.W.2d 95, 99 (1984). "[A] matter is collateral if it does not meet the following test: 'Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?'" ***Id.*** at 169, 344 N.W.2d at 100 (citations omitted).

was not "of consequence" and, accordingly, we affirm the circuit court's orders denying Marek's request for postconviction discovery.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.