COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1995-CR **Cir. Ct. No. 2002CF312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY L. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Mary Krueger appeals an order denying her WIS. STAT. § 974.07[1] postconviction motion for DNA testing. Krueger argues the

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

circuit court applied the wrong standard for determining whether DNA testing may occur at her own expense. We reject Krueger's argument and affirm the order.

BACKGROUND

¶2 The State charged Krueger with first-degree intentional homicide, as party to a crime, for the shooting death of her husband, Roland Krueger. At trial, Sarah Johnson testified that she knew Krueger and Roland for several years and had, on occasion, supplemented her income by having sex with Roland for money. Johnson testified that Krueger confronted her about the sexual relationship and promised to pay her $10,000 and keep her prostitution secret from Johnson's mother and children if Johnson agreed to allow Krueger to take a picture of Johnson having sex with Roland.

¶3 At an appointed time, Johnson went to the Krueger farm and performed oral sex on Roland. Johnson testified that as Roland tucked in his shirt, Johnson heard Krueger yell, "Get the fuck out of the way, Sarah." Johnson "hit the floor," heard a shot and then saw Krueger eject and load a new round into a rifle. Johnson testified that as Roland lay on the floor, Krueger aimed the gun at his head and fired again. Johnson further testified that after shooting Roland, Krueger threatened Johnson into helping Krueger make it look like a robbery.

¶4 Johnson told investigators that Krueger gave her a plastic bag containing a number of items, including a wallet, a check, some shells and rubber gloves, and told Johnson to get rid of it. Johnson indicated she disposed of the bag in the outhouse of a recreational property. Deputies recovered the plastic grocery store bag from inside the outhouse toilet pit. Law enforcement submitted evidence, including the gloves, to the Wisconsin State Crime Laboratory for DNA

analysis. At trial, the jury was provided with a "Stipulation and Agreed Facts" that summarized the DNA analysis findings. The stipulation provided, in relevant part:

> It is stipulated that the DNA typing profile obtained from the latex gloves … showed a mixture of DNA from more than one individual. The DNA mixture consisted of a major DNA component and a minor DNA component. The major DNA component profile of the plastic gloves is consistent with the DNA profile obtained from the blood standard from Sarah Johnson. To a reasonable degree of scientific certainty, the source of the major DNA component is Sarah Johnson. To a reasonable degree of scientific certainty the minor DNA component could not have originated from Roland Krueger, Sarah Johnson, or Mary Krueger.

Krueger was ultimately convicted upon a jury's verdict of the crime charged, and that conviction was affirmed on direct appeal. *See* ***State v. Krueger***, No. 2004AP2191-CR, unpublished slip op. (WI App May 3, 2005).

¶5 Krueger filed the underlying WIS. STAT. § 974.07 motion for DNA testing of the gloves to compare the results to the DNA profiles of three individuals she believes could match the minor DNA component on the gloves. Krueger sought testing at the State's expense and, in the conclusion to her motion, alternatively sought access to the evidence to allow testing at her own expense. The State opposed testing at its expense, but did not oppose testing at Krueger's own expense. The circuit court denied the motion after a hearing. This appeal follows.

DISCUSSION

¶6 A person convicted of a crime may move for postconviction DNA testing under WIS. STAT. § 974.07. Whether a movant has the right to obtain and test certain biological material under § 974.07 requires the application of the

statute to specific facts, which presents a question of law that we review independently. ***State v. Moran***, 2005 WI 115, ¶26, 284 Wis. 2d 24, 700 N.W.2d 884. This court upholds the circuit court's factual findings unless they are clearly erroneous. ***State v. Novy***, 2013 WI 23, ¶22, 346 Wis. 2d 289, 827 N.W.2d 610.

¶7 Where a movant does not meet the heightened requirements for testing at the State's expense, the movant may nonetheless seek testing at his or her own expense under WIS. STAT. § 974.07(6). On appeal, Krueger does not argue that she is entitled to testing at the State's expense. Rather, she contends that the circuit court erred by applying only the standard for testing at the State's expense, when she alternatively moved for testing at her own expense. Citing ***Moran***, Krueger argues the order should be reversed and the matter remanded for the circuit court to consider her motion under the proper standard. We are not persuaded.

¶8 Whether Krueger sought testing at the State's expense or at her own expense, she was required to show that the evidence satisfied the conditions under WIS. STAT. § 974.07(2). *See* ***Moran***, 284 Wis. 2d 24, ¶3. With specific respect to testing at one's own expense, the ***Moran*** court concluded that a movant must satisfy three prerequisites: (1) the movant must show that the evidence meets the conditions under § 974.07(2); (2) the movant must comply with all reasonable conditions imposed by the court to protect the integrity of the evidence; and (3) the movant must conduct any testing of the evidence at his or her own expense. ***Id.*** WISCONSIN STAT. § 974.07(2) provides in relevant part:

> [A] person may make a motion in the court in which he or she was convicted … for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, 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.

¶9 In ***Moran***, our supreme court remanded the case because the circuit court failed to evaluate whether the evidence met the requirements under § 974.07(2). ***Moran***, 284 Wis. 2d 24, ¶44. Here, and contrary to Krueger's assertion, the circuit court analyzed the evidence under § 974.07(2).

¶10 The court noted that the evidence had already been tested for the presence of DNA—one of the criteria under § 974.07(2)—acknowledging that Johnson was the source of the major DNA component and that Krueger, Johnson and Roland were excluded as sources of the minor DNA component. Although the evidence was previously tested, § 974.07(2)(c) provides that it may 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." Krueger sought to utilize Mini STR DNA (MiniFiler) testing.

¶11 At the hearing on Krueger's motion, Julie Heinig, an assistant laboratory director and DNA technology leader at DNA Diagnostic Center in Ohio, explained that MiniFiler testing is used to develop profiles from specimens with degraded or limited DNA, and acknowledged MiniFiler's limitations when examining evidence that contains DNA from multiple persons. Heinig opined,

based on her review of the data, that there were "at least two contributors or more [to the minor profile], with at least one individual being a male individual." Heinig opined, however, that it was "possible" MiniFiler could produce more probative results than those produced during pre-trial DNA testing. Sherry Culhane, a technical unit leader for the DNA section of the Wisconsin State Crime Laboratory, opined it was unlikely that a profile suitable for identification could be developed through the use of MiniFiler.

¶12 The circuit court ultimately determined that MiniFiler testing would not likely produce new results. The court heard from two experts and it was entitled to weigh their testimony when it made its determination. The court could reasonably accept the State crime lab's position that the test would be unlikely to produce meaningful results. That the court did not expressly acknowledge Krueger's alternative request for testing at her own expense is not fatal to its analysis. When the court determined Krueger had not satisfied the criteria under WIS. STAT. § 974.07(2)(c), the court implicitly concluded that Krueger had also failed to satisfy the standard for testing at her own expense.[2]

By the Court.—Order affirmed.

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

[2] We note that even though the State did not oppose testing at Krueger's own expense in the circuit court, whether Krueger met her burden under WIS. STAT. § 974.07(2) presents a legal question. A party's concession on a legal issue does not bind a court's determination of an issue. *See* ***Fletcher v. Eagle River Mem'l Hosp., Inc.***, 156 Wis. 2d 165, 182, 456 N.W.2d 788 (1990) (question of law "cannot be bargained away by counsel nor shielded from *ab initio* consideration by successive court reviews").