Appeal No. 2012AP2229-CR **Cir. Ct. No. 1999CF2788**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES EDWARD HENNINGS,

DEFENDANT-APPELLANT.

FILED

OCT 3, 2013

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, Higginbotham and Kloppenburg, JJ.

This case concerns the construction of the statutory test for postconviction deoxyribonucleic acid (DNA) testing at public expense. Specifically, this case hinges on the proper interpretation of the language of WIS. STAT. § 974.07(7)(a)2.[1] The State argues, and Judge Richard J. Sankovitz of the Milwaukee County Circuit Court agreed, that the interpretation urged by Charles Hennings, the defendant, could result in an unreasonably high volume of speculative motions for ultimately non-exculpatory postconviction DNA testing at public expense, contrary to the intent of the legislature as expressed in the statute as a whole.

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Because the resolution of this dispute is of statewide significance and will have statewide impact on the courts, law enforcement, criminal defendants, crime victims and, potentially, a significant effect on the functioning of the State Crime Laboratory, we certify this appeal to the Wisconsin Supreme Court for its review and determination.

Background

Charles Hennings was convicted of felony murder after a second trial, and sentenced to a sixty-year prison term. He filed a motion for postconviction DNA testing under WIS. STAT. § 974.07(2) and (7)(a), requesting testing of the evidence collected from the scene of the victim's murder. He sought to have the genetic profiles obtained from the DNA testing compared with the DNA profiles of offenders stored in DNA databanks. Hennings asserted that "'redundant profiles,'" meaning DNA of the same person found on more than one of the items, would establish a pattern pointing to another person "who had 'no innocent reason for leaving the evidence behind.'"

The circuit court denied Hennings' motion for DNA testing at public expense, but granted his request to conduct the DNA testing at his own expense. The circuit court's resolution of Hennings' motion turned on its interpretation of the requirements of WIS. STAT. § 974.07(7)(a). As discussed below, the circuit court adopted a view of the statute advanced by the State on appeal. This interpretation led the court to deny Hennings' motion because Hennings failed to demonstrate a sufficient probability that the results of the DNA testing would be exculpatory.

Discussion

WISCONSIN STAT. § 974.07(2) provides that at any time after being convicted a person may move for an order requiring DNA testing of evidence that meets certain conditions, including that "[t]he evidence is relevant to the investigation or prosecution that resulted in the conviction." WIS. STAT. § 974.07(2)(a). A movant who meets the conditions in § 974.07(2) is entitled to DNA testing *at public expense* if the movant meets certain additional conditions, including that, "[i]t is reasonably probable that the movant would not have been prosecuted [or] convicted ... for the offense at issue in the motion under sub. (2), if exculpatory [DNA] testing results had been available before the prosecution [or] conviction ... for the offense." WIS. STAT. § 974.07(7)(a)2.[2]

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[2] WISCONSIN STAT. § 974.07(7)(a)2. is a subdivision of § 974.07(7)(a), which states:

> A court in which a motion under sub. (2) is filed shall order forensic [DNA] testing if all of the following apply:
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> 1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).
>
> 2. It is reasonably probable that the movant would not have been prosecuted [or] convicted … for the offense at issue in the motion under sub. (2), if exculpatory [DNA] testing results had been available before the prosecution [or] conviction … for the offense.
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> 3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).
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> 4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

Hennings argues that the plain language of WIS. STAT. § 974.07(7)(a)2. requires the court to presume that the DNA testing results will be exculpatory and then to assess whether such presumed exculpatory results would lead to a reasonable probability that he would not have been prosecuted or convicted. Hennings also argues that the circuit court's interpretation of § 974.07(7)(a)2., which requires him to show a reasonable probability that the results of the DNA testing will be exculpatory, defies the plain language and the purpose of the statute.

The circuit court observed, "[i]f the meaning of the statute is as plain as grammar suggests, there isn't much more to talk about …." We understand the circuit court to have been suggesting that a grammatically correct interpretation of WIS. STAT. § 974.07(7)(a)2. appears to require a court to presume that the DNA testing results will be exculpatory. This presumption flows from the italicized language in this quote from the statute: "It is reasonably probable that the movant would not have been prosecuted [or] convicted ... *if exculpatory [DNA] testing results had been available."* (Emphasis added.)

According to the State and the circuit court, Hennings' grammatical reading of WIS. STAT. § 974.07(7)(a)2. leads to absurd results and renders other sections of the statute superfluous. The State argues that the plain language interpretation of § 974.07(7)(a)2. leads to absurd results because:

> If the court must presume to be "exculpatory" any piece of evidence obtained by police from a crime scene that is arguably "relevant to the *investigation or* prosecution" and might have someone's DNA on it, there is no practical limit to mandatory postconviction testing at public expense. Taken literally, this approach would require postconviction DNA testing in every single case where items of evidence that conceivably could contain DNA are recovered from a crime scene.

The State contends that this will "impose an intolerable burden on law enforcement agencies and the State Crime Lab."

Whether or not the State is correct in its prediction that Hennings' interpretation would require testing of all items recovered from a crime scene that could "conceivably" contain DNA evidence, we understand both the State's and the circuit court's concern to be that Hennings' interpretation could not have been intended by the legislature because it would unreasonably burden the already strained resources of the State Crime Laboratory.

Hennings counters that his reading of the statute will not so readily require DNA testing at public expense, because the evidence must still be relevant to the investigation or prosecution that resulted in conviction under WIS. STAT. § 974.07(2)(a). Hennings adds that "presuming favorable results is never alone enough for mandatory testing. The statute still requires an additional showing of a reasonable probability of a different result." (Emphasis omitted.) Relying on ***State v. Hudson,*** 2004 WI App 99, ¶¶19-21, 273 Wis. 2d 707, 681 N.W.2d 316 (finding that the defendant could not demonstrate a reasonable probability that he would not have been prosecuted or convicted even if exculpatory DNA testing results were presumed, "given the overwhelming evidence of his guilt"), Hennings argues that presuming favorable results does not mandate DNA testing at public expense in every case, and that floodgates have not been opened in other states where exculpatory results are presumed.

The State also argues that the plain language interpretation of WIS. STAT. § 974.07(7)(a)2. renders § 974.07(6) and (7)(b) superfluous.[3] According to the State, if exculpatory DNA testing results are presumed, a defendant must merely make the "threshold showing that the evidence to be tested is 'relevant to the investigation or prosecution that resulted in the conviction'" to satisfy the requirements of § 974.07(7)(a). The State contends that nearly all defendants will be able to make this showing, and will therefore be eligible for mandatory DNA testing at public expense. Consequently, no defendants will seek testing at their own expense under § 974.07(6) or at the discretion of the court under § 974.07(7)(b), rendering those portions of the statute superfluous.

Hennings counters that his reading of the statute does not make WIS. STAT. §§ 974.07(6) or 974.07(7)(b) superfluous. A defendant who moves for DNA testing at public expense under § 974.07(7)(a) must in addition to showing that the evidence is relevant, also show that it is reasonably probable that he or she would not have been prosecuted or convicted had exculpatory DNA testing results been available before trial. WIS. STAT. § 974.07(7)(a)2. Again relying on ***Hudson,*** 273 Wis. 2d 707, ¶¶19-21, Hennings argues that not every defendant will

[3] WISCONSIN STAT. § 974.07(6) applies to exchanges of information related to the sharing of evidence containing biological material and of findings related to testing of that material between the district attorney and the movant, and is the provision by which defendants may obtain DNA testing at their own expense. This provision requires only that "the information being disclosed or the material being made available is relevant to the movant's claim." The circuit court found that Hennings satisfied this requirement here.

WISCONSIN STAT. § 974.07(7)(b) authorizes ("may"), but unlike WIS. STAT. § 974.07(7)(a) does not require ("shall"), a circuit court to order DNA testing at public expense if the defendant shows that it is reasonably probable that "the outcome of the proceedings that resulted in the conviction ... would have been more favorable" had DNA testing results been available before the defendant was prosecuted. This provision does not contain the presumption that the DNA testing results be exculpatory, and does not use the term "exculpatory" at all.

be able to show that exculpatory DNA testing results would have changed the outcome of the case so that he or she would not have been prosecuted or convicted. Defendants who cannot make that additional showing may therefore have recourse to DNA testing at their own expense under § 974.07(6).

Defendants may also have recourse to WIS. STAT. § 974.07(7)(b), which permits a circuit court in its discretion to order DNA testing at public expense if it is reasonably probable that the results of the testing would lead to a more favorable outcome of the proceedings that led to the conviction. The parties agree that a defendant who can show that the defendant would have benefited in terms of a reduced charge or a lesser sentence, may seek testing at public expense at the court's discretion under § 974.07(7)(b). Yet, the State argues that a defendant will never need to resort to § 974.07(7)(b) if the DNA testing is presumed exculpatory under § 974.07(7)(a)2. As the circuit court noted, "if the evidence in the government's possession [must be presumed] exculpatory, who cares if it is mitigatory?"

The circuit court rejected Hennings' "grammatical" construction in favor of an interpretation that the court reasoned "preserves and makes sense of more of the statute." The circuit court based its interpretation in part on an understanding of the term "exculpatory" as embracing the concept of "tending" to exonerate, or likely to be true. Such an understanding, the court reasoned, would preserve the independent meaning of other parts of the statute, from requiring that the court then assess whether the tendency to be exculpatory is sufficient to establish a reasonable probability that the defendant would not have been prosecuted or convicted (under WIS. STAT. § 974.07(7)(a)2.), to directing defendants unable to show any tendency to be exculpatory to the other subsections

that allow testing, at private or public expense, under other circumstances (under WIS. STAT. § 974.07(6) and (7)(b)).

The circuit court ultimately grounded its interpretation on the concern that Hennings' "grammatical" interpretation would lead to absurd results, adding to the burden of the already overburdened court system without effectively serving the statute's purpose. The circuit court believed that construing the statute as urged by Hennings would lead to absurd results because it would be too easy for defendants to obtain DNA testing at public expense in cases where there was no reasonable likelihood of there being exculpatory test results. As the court stated:

> The statute applies to any and all evidence "relevant to the investigation or prosecution that resulted in the conviction" that is still in the possession of the government. WIS. STAT. §§ 974.07(2)(a), (b). Think about how much evidence tends to be collected by the police as they investigate a crime scene, and how much of it ultimately ties any suspect to the crime.
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> It is often the case that when the police arrive at a crime scene – say, a shooting that appears to have erupted from a robbery or a botched drug deal – they know little of the details of the shooting. So they collect and preserve everything that might help them solve the crime, every item that seems like it might relate to the crime they are investigating. They pick up all kinds of items lying about in the vicinity. They pick up obvious (or seemingly obvious) items such as weapons and shell casings and clothing. And they also pick up personal items that may not have been instrumental in the crime, but nonetheless may link a suspect to the scene, such as cell phones and sunglasses and plastic bags and pipes and bottles and innumerable other items.
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> Frequently, however, these potential leads do not pan out. The presence of these items at the scene of the crime is merely coincidental. Compare the items listed on the typical police inventory marked as a trial exhibit in a typical shooting case with the items that actually are introduced as evidence. It is common for such inventories

> to list many more items than ever come into play. Of items that are collected by the police but not introduced at trial, their presence at a crime scene may say much more about the prevalence of other crime in the neighborhood, or of the general state of litter, than about who committed the crime.
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> But because these items seemed relevant at the outset of the investigation and have found their way into the possession of the police, they are available for DNA testing. And if it is *presumed* that these items contain DNA evidence that exculpates the defendant, then all of these items must be tested. The potential absurdity of this arrangement is not hard to conceive: Consider a case where none of the physical evidence collected by the police at the scene of a shooting turns out to be inculpatory, yet because all of the evidence is "relevant to the investigation," WIS. STAT. § 974.07(2)(a), and all of it is in the possession of the government, WIS. STAT. § 974.07(2)(b), if all of it is presumed exculpatory, as Mr. Hennings contends, then all of it must be tested, at public expense.

We acknowledge that the State's and the circuit court's warnings of unreasonably high numbers of motions for ultimately unfounded DNA testing at public expense are mere assertions, and we cannot discern whether such absurd results will follow from Hennings' construction of the statute. Nevertheless, if the State and circuit court are correct, then the prospect of such a significant statewide impact warrants guidance from the Wisconsin Supreme Court. For the reasons above, we conclude that the dispute over the test to be applied when a defendant seeks DNA testing at public expense is a matter of statewide concern which is in need of prompt and final resolution by the Wisconsin Supreme Court.