COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2910-CR **Cir. Ct. No. 2007CF677**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY S. GALLENTINE,

DEFENDANT-APPELLANT.

APPEAL from order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Bradley Gallentine, pro se, appeals an order denying his WIS. STAT. § 974.07 (2013-14)[1] postconviction motion for DNA

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

testing. Gallentine argues the circuit court erred by denying his request to retest DNA, claiming that new testing procedures would yield more favorable results than the test utilized pretrial. We reject Gallentine's arguments and affirm the order.

BACKGROUND

¶2 Gallentine was convicted of sexually assaulting an eighty-five-year-old woman suffering from Alzheimer's disease. The victim's brother-in-law, Robert R., testified at trial that he was outside the victim's home when he heard her calling for her deceased husband. Robert noticed a bicycle parked in the driveway and entered the home. Robert discovered a man in the victim's living room with his head down and his hands between his sister-in-law's legs. The man, whom Robert did not recognize, quickly left out the back door with his face turned away from Robert. Robert's wife, Rogene, was waiting in a car outside the victim's residence and watched the man exit the house and leave on the bicycle. Gallentine was charged with second-degree sexual assault four days later.

¶3 The principal issue at trial was the attacker's identity. Rogene testified the assailant wore an orange shirt at the time of the assault. Three neighbors testified they saw Gallentine around the time of the assault wearing an orange shirt and riding a bicycle. Gallentine's wife testified her husband was aware the victim had Alzheimer's disease and owned an orange shirt that she had not seen since the day of the assault. Police testimony noted inconsistencies in Gallentine's statements following the assault.

¶4 The State bolstered its identification case with DNA evidence taken from the victim. The State's DNA analyst, Jennifer Zawacki, testified that a "trace" level of male DNA was detected on one of the vaginal swabs. The DNA

was then "processed for Y-STR DNA analysis," which analyzes only male DNA using twelve genetic markers found on the Y chromosome. Zawacki testified that because there was such a small amount of male DNA to test, the evidence yielded an incomplete data profile consisting of only four of the twelve possible DNA markers. All four markers, however, were consistent with Gallentine's DNA profile. Zawacki acknowledged the testing method used could not eliminate any of Gallentine's paternal relatives. In addition, Zawacki testified the DNA profile matched one individual other than Gallentine when searched against a State database of 4,004 individuals. On cross-examination, Gallentine's attorney elicited testimony emphasizing the incomplete DNA evidence could not prove Gallentine was the attacker.

¶5 The State also bolstered its identification case with the results of photographic lineups conducted in the days following the assault. Police presented Robert with six photographs, but he was unable to identify the perpetrator in the photo array. Officer Ryan Lambeseder subsequently testified that although Robert could not make a definitive identification, Robert selected two photographs he said were very similar to the person he had seen at the victim's home. One of the two photographs Robert selected was of Gallentine. Rogene picked Gallentine's photograph out of the same lineup. A second photographic lineup focused on the bicycle Robert saw outside the victim's residence. Robert selected Gallentine's bicycle from the photo array presented.

¶6 Gallentine was convicted upon a jury's verdict and subsequently filed a postconviction motion for a new trial, claiming he was denied the effective assistance of trial counsel. The circuit court denied the postconviction motion and, on direct appeal, we affirmed both the judgment of conviction and the order

denying postconviction relief. *See* ***State v. Gallentine***, No. 2008AP3166-CR, unpublished slip op. (WI App Feb. 2, 2010).

¶7 Gallentine subsequently filed a WIS. STAT. § 974.07 motion for DNA testing. The circuit court denied that motion, and Gallentine appealed but later voluntarily dismissed the appeal. Gallentine then filed the underlying § 974.07 motion, seeking the appointment of various DNA experts and retesting of DNA evidence by an outside laboratory.

¶8 The circuit court noted some deficiencies in Gallentine's motion but did not initially deny it. Rather, the court exercised its authority under WIS. STAT. § 974.07(11) to refer Gallentine to the Office of the State Public Defender (SPD) to determine his eligibility for the appointment of counsel. The court also directed the State to locate, identify, and preserve previously tested specimens. The SPD determined it would not appoint counsel for Gallentine. The circuit court ultimately denied Gallentine's motion and subsequent motion for reconsideration without a hearing. This appeal follows.

DISCUSSION

¶9 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 application of the statute to specific facts, which presents a question of law 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.

¶10 Regardless of whether DNA testing is sought at the State's expense or a defendant's expense, the defendant must satisfy certain prerequisites under WIS. STAT. § 974.07(2). That statute 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*. (Emphasis added)

(Emphasis added).

¶11 Here, the State concedes that the evidence Gallentine seeks to retest satisfies both WIS. STAT. § 974.07(1)(a) and (b). With respect to § 974.07(2)(c), the evidence was previously tested, the results were presented at trial, and a government agency currently possesses the evidence. However, Gallentine's motion failed to identify a testing technique that was not available or not utilized at the time the DNA evidence was originally analyzed. Rather than deny the motion outright, the circuit court provided Gallentine the opportunity to convince the court "that such testing exists."

¶12 The State subsequently informed the circuit court that, according to the Wisconsin State Crime Laboratory analyst who testified at trial, "the Y-STR

technology that was used on the sample in 2007 remains the same." The State's letter continued: "[The analyst] did indicate that they currently look for 23 [DNA] markers instead of the 12 markers that they formerly looked for. Therefore, it is likely the result would be the same, that an incomplete profile would be the result of any additional testing."

¶13 Even assuming the change from twelve to twenty-three markers constituted a new "scientific technique," Gallentine failed to satisfy his burden of demonstrating that this change would provide a reasonable likelihood of more accurate and probative results under the facts of this case. Gallentine failed to meet his burden to show, through expert evidence or otherwise, that a retest of the DNA sample would likely produce a different result in his favor. As the circuit court noted in its decision denying the motion, all of Gallentine's arguments and reasons for requesting additional DNA testing were "simply his personal conclusions." Because Gallentine failed to satisfy the threshold requirements of WIS. STAT. § 974.07(2)(c), the court properly denied the motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court may deny hearing if motion fails to raise facts sufficient to entitle movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates defendant is not entitled to relief).[2]

[2] Where, as here, a defendant seeks testing at the State's expense, the defendant must also satisfy the heightened requirements for testing under WIS. STAT. § 974.07(7). *See* ***State v. Moran***, 2005 WI 115, ¶3, 284 Wis. 2d 24, 700 N.W.2d 884. Because Gallentine failed to satisfy the criteria under § 974.07(2)(c), we need not address whether the additional burden for testing at the State's expense was met. *See* ***State v. Cain***, 2012 WI 68, ¶37 n.11, 342 Wis. 2d 1, 816 N.W.2d 177 (cases should be decided on narrowest grounds possible).

By the Court.—Order affirmed.

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