

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2321-CR

Cir. Ct. No. 2004CF1971

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZALASSIO J. SAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Zalassio Sain appeals a judgment of conviction and an order denying his motion for postconviction relief. He argues that the circuit court should have granted his motion to compel the State Crime Laboratory to conduct an examination for fingerprints on a stolen Tums jar dropped by robbers

in the yard outside the apartment building where the robbery occurred. *See* WIS. STAT. § 165.79(1) (2005-06).¹ The State counters that § 165.79(1) does not apply post-trial.² In the alternative, Sain argues that the circuit court should have allowed *his* expert access to the Tums jar so it could be examined for the presence of fingerprints, citing *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). We affirm.

¶2 Regardless of whether Sain’s argument for testing is based on WIS. STAT. § 165.79 or on the due process standard discussed in *O'Brien*, we conclude that Sain is not entitled to access to the evidence. As the supreme court explained in *O'Brien*, “a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence.” *Id.*, ¶25. If § 165.79 applies post-trial, an issue we need not decide, we believe the same analysis would guide a circuit court’s decision to allow access to the evidence.

¶3 *O'Brien* teaches that, in deciding whether evidence is consequential, we look at whether “there is a reasonable probability that, had the evidence been

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN STAT. § 165.79(1) provides, in relevant part:

Evidence, information and analyses of evidence obtained from law enforcement officers by the laboratories is privileged and not available to persons other than law enforcement officers nor is the defendant entitled to an inspection of information and evidence submitted to the laboratories by the state or of a laboratory’s findings, or to examine laboratory personnel as witnesses concerning the same, prior to trial, except to the extent that the same is used by the state at a preliminary hearing and except as provided in s. 971.23. Upon request of a defendant in a felony action, approved by the presiding judge, the laboratories shall conduct analyses of evidence on behalf of the defendant.

disclosed to the defense, the result of the proceeding would have been different.” *Id.*, ¶24 (citations omitted). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* (citations omitted). The party seeking postconviction discovery must establish that the evidence sought to be gained is consequential. *Id.*, ¶22e.

¶4 Sain has not made a sufficient showing that fingerprint evidence on the Tums jar is consequential. There is no testimony or evidence from any expert as to the likelihood that an identifiable fingerprint would be left by a person touching the Tums jar. In the absence of this evidence, it is insignificant whether there are or are not Sain’s fingerprints on the Tums jar. It could be that Sain handled the jar without leaving fingerprints. It could be that people other than the owners of the jar handled it before it was stolen. Sain has not made a sufficient showing to warrant testing because the evidence he seeks is not exculpatory and, thus, is not of consequence to this case.

By the Court.—Judgment and order affirmed.

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

