COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP814-CR **Cir. Ct. No. 1993CF932411**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ANDREW REA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Mark Andrew Rea appeals the trial court's order denying his request to have DNA testing done on various pieces of evidence that were collected by the police during the investigation of a murder and sexual assault which ultimately led to Rea's convictions for first-degree intentional

homicide (party to a crime) and second-degree sexual assault (party to a crime). Because Rea has not shown that "[i]t is reasonably probable that [he] would not have been prosecuted [and] convicted … if exculpatory [DNA] testing results had been available before the prosecution [and] conviction … for the offense," we affirm. WIS. STAT. § 974.07(7)(a)2. (2003-04).[1]

I. BACKGROUND.

¶2 In July 1993, Rea, then sixteen years old, was charged as an adult with first-degree intentional homicide and second-degree sexual assault, both as a party to the crime. This occurred after he was waived into adult court by a juvenile court judge. The underlying facts, as stated in their confessions, were that Rea and David Newbury, a fellow student at Pulaski High School, skipped class and were sitting on a railroad bridge when they encountered the victim, Charlene Dvorak, also a high school student. After a verbal exchange in which the victim replied "fuck you," or words to that effect, one of the two grabbed a brick and threw it at her, striking her in the head. She fell, and as she sat on the ground dazed, Rea kicked her in the face. She apparently was knocked unconscious, at which time one or both of them dragged her by her feet over railroad tracks and rough terrain. After moving her, the two sexually assaulted her. Afterwards, one or both of them struck her with a large brick and a board. She was still living when she was found, but died later. In their confessions, each told police that the other was the main culprit.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 At a joint trial, the jury convicted Rea and Newbury of both counts. Rea was sentenced to life imprisonment with a parole eligibility date of 2065 on count one, and a ten-year consecutive sentence on count two. Rea's convictions were affirmed on appeal in an unpublished decision. ***State v. Rea***, No. 94-2460-CR, unpublished slip op. (Wis. Ct. App. Apr. 16, 1996). In December 2006, lawyers from the Wisconsin Innocence Project filed a motion seeking court-ordered DNA testing on items collected from the scene of the crime and the hospital where Dvorak was treated. After requesting briefs on the matter, the trial court denied the motion. In its order, the trial court stated: "there is not a reasonable probability that testing of the requested items would have altered the outcome of the trial … there is not a reasonable probability that testing of the requested items would directly exculpate or exonerate the defendant." This appeal follows.

II. ANALYSIS.

¶4 Pursuant to WIS. STAT. § 974.07, Rea seeks to have DNA testing done at public expense on the rape kit samples from Dvorak, fingernail clippings from Dvorak, and the blood-stained rocks, boards and a brick, all of which were believed to be murder weapons. Rea maintains that he has met the requirements set forth in the statute. The State disputes only the requirement found in sub. (7)(a)2., arguing that Rea has not shown that "[i]t is reasonably probable that the movant would not have been prosecuted [or] convicted … for the offense at issue … if exculpatory [DNA] testing results had been available before the prosecution [or] conviction … for the offense." We agree with the State.

¶5 This case requires us to interpret the aforementioned statute and apply it to specific facts. We review questions of statutory interpretation *de novo*. ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769.

¶6 WISCONSIN STAT. § 974.07, in pertinent part, reads:

> **Motion for postconviction deoxyribonucleic acid testing of certain evidence.**
>
> ….
>
> **(2)** At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect 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.

The trial court must order the testing under certain circumstances.

> **(7)**(a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:
>
> 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, convicted, found not guilty by reason of mental disease or defect, or adjudicated

> delinquent for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.
>
> 3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).
>
> 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.

Id.

¶7 In order to obtain DNA testing, Rea was obligated under WIS. STAT. § 974.07(2)(a) to prove that the evidence sought to be tested was "relevant to the investigation or prosecution that resulted in the conviction," and under § 974.07(7)(a)2., that it was "reasonably probable that the movant would not have been prosecuted [or] convicted … if exculpatory [DNA] results had been available before the prosecution [or] conviction."

¶8 As noted, the State disputes only the requirement found in WIS. STAT. § 974.07(7)(a)2. There is little doubt that DNA testing would not yield a result favorable to Rea. First, the murder weapons were items found on the ground and they could have been handled by any number of people, both before and after the murder, as it was unclear how long Dvorak laid on the ground before being discovered. Second, the rape kits are unlikely to produce any positive results because both men denied sexual intercourse. While DNA testing of the fingernail clippings might yield DNA results, it is clear that only Newbury's DNA would be found, as witnesses who observed him acting strangely near the crime scene on the day of the murder thought he may have had scratches on his face.

¶9 Further, Rea ignores the fact that his co-actor Newbury not only confessed to the crime, but also testified at the joint trial admitting his guilt and naming Rea as an accomplice. Rea gives us no explanation for why Newbury would implicate Rea as his accomplice unless it was because he was an accomplice. The officer who interrogated Rea did not know any details of Newbury's confession, yet the two confessions were interlocking. As to Rea's confession, he was in custody for just over an hour when he was interrogated, and, after giving three different alibis which were unsupported after being investigated, he finally admitted his involvement, although he downplayed his role. In any event, no evidence of police coercion has been submitted and the trial court found the confessions admissible. As the State noted in its brief, "[i]t would be difficult to find more reliable, more credible, admissions of guilt than these two. They corroborate each other in the most minute and intimate details with regard to how this grisly episode unfolded."

¶10 Other evidence also pointed to Rea's guilt. He had written a story about death and killing a month and a half before the murder, he admitted to a classmate several days after the murder that he killed Dvorak, and his psychological profile suggested that he was capable of such an act.[2] While the DNA testing might reveal which one of the two actually threw the brick or hit Dvorak with a board, it is unnecessary to make this distinction, as they were charged as "party to a crime." *See* WIS. STAT. § 939.05(1) ("Whoever is concerned in the commission of a crime is a principal and may be charged with

[2] In his confession to his classmate, Rea did not accurately state how Dvorak was murdered. However, it is uncommon for people to confide in others that they have committed murder when it is untrue.

and convicted of the commission of the crime although the person did not directly commit it…."). "If a movant seeks DNA testing at public expense, the movant must proceed under § 974.07(7)(a) or (b), and satisfy the heightened requirements in subsection (7)." ***State v. Moran***, 2005 WI 115, ¶57, 284 Wis. 2d 24, 700 N.W.2d 884. Rea has not shown a reasonable probability that he would not have been either prosecuted or convicted if exculpatory DNA testing had been available earlier.

¶11 Finally, Rea submits that the trial court "used the wrong standard by requiring that potential DNA testing 'exonerate' the movant." While the trial court did comment, "[m]oreover, based on the confessions and trial testimony there is not a reasonable probability that testing of the requested items would directly exculpate or exonerate the defendant," it did so after correctly noting the standard found in the statute, finding "there is not a reasonable probability that testing of the requested items would have altered the outcome of the trial." The trial court utilized the correct standard, and, as an afterthought, merely remarked that it did not believe that there was any possibility in this case that DNA testing could directly exculpate or exonerate Rea. The trial court utilized the proper standard. For the reasons stated, the order of the court is affirmed.

By the Court.—Order affirmed.

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