COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0578 **Cir. Ct. No. 01CV5175**

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

STATE OF WISCONSIN
EX REL. DEREK ANDERSON,

PETITIONER-APPELLANT,

V.

LEVERETT BALDWIN,
SHERIFF OF MILWAUKEE COUNTY,

RESPONDENT-RESPONDENT.

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

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

¶1 PER CURIAM. Derek Anderson appeals from an order of the trial court denying his petition for a writ of *habeas corpus* and ordering extradition. Anderson contends: (1) the trial court erred in finding that he was a fugitive from the State of North Carolina without holding an evidentiary hearing; (2) pursuant to

WIS. STAT. § 801.01(2) (1999-2000),[1] the trial court erred in refusing his request for discovery[2]; and (3) the trial court erred in failing to order the State to turn over any exculpatory evidence, including that obtained from the John Doe investigation. We affirm.

I. BACKGROUND.

¶2 On July 2, 1998, fifty-five-year-old Allen Krnak, his wife, Donna Krnak, fifty-two, and their son Thomas Krnak, twenty-one, disappeared. They reportedly left their home in Jefferson County, Wisconsin, for their cabin near Coloma, Wisconsin, approximately two hours north, to celebrate the Fourth of July weekend. The family never arrived.

¶3 Anderson, their eldest son, later told police investigating the disappearance that the last time he saw his family was on July 2, 1998, around 5:30 p.m., as they prepared to depart for the cabin.[3] He stated that he did not accompany the others, but later became concerned when his family did not return as scheduled. On July 6, 1998, Anderson called the Waushara County Sheriff's Department, the county where the cabin was located, to report his family missing. On July 10, 1998, Anderson alerted the DNR game warden in Sauk County, Wisconsin, of a location near the family cabin where the family would often hunt.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 801.01(2) outlines the civil discovery rule. A *habeas corpus* action challenging discovery is a civil proceeding. *See* ***State ex rel. Dowe v. Waukesha County Circuit Court***, 184 Wis. 2d 724, 728, 516 N.W.2d 714 (1994) ("Habeas corpus is a civil proceeding….").

[3] Anderson was formerly known as Andrew Krnak, but changed his name, date of birth, and social security number just days after his family's disappearance.

An hour later, police discovered the Krnaks' missing family vehicle in that location, but the interior and exterior had been swept clean of fingerprints.

¶4 Allen Krnak's skeletal remains were found in a national forest in Jackson County, North Carolina, on December 17, 1999, and were positively identified in January 2001. An autopsy revealed that he died from a skull fracture caused by blunt force injuries to the head. Allen Krnak's remains were identified in an area Anderson was known to hike and camp during his years as a student at Western Carolina University from 1991 to 1996.

¶5 On February 27, 2001, Anderson was indicted for first-degree murder by a North Carolina grand jury on charges of killing his fifty-five-year-old father. He was also a suspect in the disappearances of his mother and brother. Consequently, an arrest warrant was issued for Anderson in North Carolina. On February 28, 2001, the governor of North Carolina requested the arrest and extradition of Anderson from Wisconsin. The governor of Wisconsin subsequently issued a warrant for Anderson's arrest and extradition to North Carolina.

¶6 Anderson was then arrested at a halfway house in Milwaukee where he resided following his release from federal prison on unrelated charges. On June 8, 2001, Anderson filed a petition for a writ of *habeas corpus*. The trial court denied the petition and ordered his extradition to North Carolina.

II. ANALYSIS.

A. Anderson was not improperly denied the right to present evidence.

¶7 Wisconsin has always recognized the primacy of the federal law in interstate extradition. ***State v. Stone***, 111 Wis. 2d 470, 472, 331 N.W.2d 83

(1983). With respect to the standards to be applied in extradition proceedings, we follow the mandates of the United States Supreme Court, the Fourth Amendment to the United States Constitution, and the Extradition Clause, Art. IV, § 2, cl. 2, of the United States Constitution.[4] *See* ***id.*** at 473. Pursuant to federal interstate extradition law, Wisconsin has adopted the Uniform Criminal Extradition Act. *See* WIS. STAT. § 976.03.[5]

¶8 Under this act, once a request is received by the governor of the asylum state, here Wisconsin, the governor may, but is not required to, investigate the case. ***State ex rel. Jackson v. Froelich***, 77 Wis. 2d 299, 303, 253 N.W.2d 69 (1977). If the governor approves the request for extradition, an extradition warrant is issued and the accused is brought before a judge who informs the prisoner of his or her right to contest the legality of the extradition. ***Id.*** at 304. The prisoner or his counsel may contest the legality of detention and extradition by filing an

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[4] Art. IV, § 2, cl. 2, of the United States Constitution states:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[5] WISCONSIN STAT. § 976.03(2) states, in relevant part:

> **976.03 Uniform criminal extradition act.**
>
> ….
>
> **(2)** CRIMINALS TO BE DELIVERED UPON REQUISITION. Subject to the qualifications of this section, and the provisions of the U.S. constitution controlling, and acts of congress in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.

application for *habeas corpus*, the legal tool for challenging extradition.[6] ***Id.*** Our supreme court has determined that these procedures as set forth in the Uniform Criminal Extradition Act are constitutional. *See* ***id.*** at 303-09.

¶9 The scope of a trial court's inquiry in an extradition *habeas corpus* proceeding is limited to the consideration of four issues:

> Once the [asylum state] governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been

[6] WISCONSIN STAT. § 976.03(10) states:

> **(10)** RIGHTS OF ACCUSED; APPLICATION FOR HABEAS CORPUS. No person arrested upon such warrant may be delivered over to the agent whom the executive authority demanding the person shall have appointed to receive the person unless the person shall first be taken forthwith before a judge of a court of record in this state, who shall inform the person of the demand made for the person's surrender and of the crime with which the person is charged, and that the person has the right to demand and procure legal counsel; and if the prisoner or the prisoner's counsel shall state that the prisoner desires to test the legality of the prisoner's arrest, the judge of such court of record shall fix a reasonable time to be allowed the prisoner within which to commence an action for habeas corpus. When such action is commenced, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

WISCONSIN STAT. § 782.19, which outlines the means for analyzing a *habeas corpus* petition, states:

> The prisoner may move to strike the return or may deny any of the material facts set forth in the return to the writ or allege any fact to show either that the imprisonment is unlawful or that the prisoner is entitled to a discharge, which allegations and denials shall be verified by oath; and the court or judge shall proceed in a summary way to examine into the facts contained in the return and to hear the allegations and proofs of the parties in support of such imprisonment or against the same.

> charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Stone, 111 Wis. 2d at 473-74 (citation omitted); *see also* ***State v. Ritter***, 74 Wis. 2d 227, 231, 246 N.W.2d 552 (1976).

¶10 These are questions of historical fact. ***Stone***, 111 Wis. 2d at 474. Therefore, the trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. WIS. STAT. § 805.17(2). Furthermore, this court will not overturn the trial court's determination that the petitioner is a fugitive where there is merely contradictory evidence on the subject of presence or absence from the state. *See* ***State ex rel. Rodencal v. Fitzgerald***, 164 Wis. 2d 411, 418, 474 N.W.2d 795 (Ct. App. 1991). Rather, "[t]he burden rests on the defendant to show by competent evidence that he was not a fugitive from the justice of the demanding state thereby overcoming the presumption to the contrary arising from the face of an extradition warrant." ***Id.*** (citations omitted).

¶11 Here, Anderson claims that he established that he was not in North Carolina on or about the date of his family's disappearance, July 2, 1998, and, therefore, he is not a fugitive. The only evidence offered by Anderson to prove that he was not a fugitive is an affidavit of Sheriff James L. Cruzan, a sheriff of Jackson County, North Carolina, where his father's body was discovered.[7] The affidavit in question states:

> [The Jefferson County Sheriffs Department of Jefferson City, Wisconsin] interviewed Anderson and he advised that the last time he saw the family members was on July 2, [1998] around 5:20 p.m. CST at the family home [in Jefferson County] as they were preparing to leave to go to

[7] This was the original affidavit in support of the arrest warrant in North Carolina.

> the family cabin in northern Wisconsin for the Holiday weekend…. The cabin was approximately two hours away from the family home. Anderson said that he did not accompany the others.

¶12 As noted, the extradition warrant creates a presumption that Anderson was a fugitive from the justice of North Carolina. *See* ***State ex rel. Kohl v. Kubiak***, 255 Wis. 186, 188, 38 N.W.2d 499 (1949). We agree with the trial court that the affidavit of Sheriff Cruzan fails to overcome this presumption. The affidavit merely recounts Anderson's version of the events. However, Anderson fails to offer any corroborating evidence to prove that he was never in North Carolina on or about July 2, 1998. At best, the affidavit merely presents Anderson's contradictory unsworn statement whether he was in the state, which is insufficient to overcome the presumption. *See* ***id.*** Accordingly, because the *habeas corpus* proceeding is not the proper forum to try the question of the guilt or innocence of the accused, *see* ***id.***, absent corroborating evidence, we conclude that Anderson's statement to police that he wasn't in the demanding state is insufficient to overcome the presumption. Thus, he is not entitled to an evidentiary hearing and the trial court is affirmed.

B. Anderson was not entitled to formal discovery.

¶13 Attached to Anderson's petition for a writ of *habeas corpus* was a motion for leave to conduct discovery; namely, depositions and interrogatories, in order to present evidence at an evidentiary hearing in order to prove that he was not a fugitive from North Carolina. The trial court denied Anderson's request, concluding that discovery was unnecessary because he was not entitled to an evidentiary hearing. We agree and conclude that because Anderson is not entitled to an evidentiary hearing due to his own failure to overcome the presumption that he was a fugitive, any discovery would be inappropriate.

¶14 The scope of discovery in a *habeas corpus* proceeding lies within the sound discretion of the trial court and we will not reverse absent an erroneous exercise of that discretion. *See* ***Barry v. United States***, 528 F.2d 1094, 1101 (7th Cir. 1976). To find an erroneous exercise of discretion, we must find either that discretion was not exercised or that there was no reasonable basis for the trial court's decision. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971).

¶15 In concluding that he is entitled to discovery, Anderson relies on ***Harris v. Nelson***, 394 U.S. 286 (1969). However, ***Harris*** only authorizes discovery where the petitioner has "establishe[d] a prima facie case for relief." ***Id.*** at 290. In the instant case, as outlined above, Anderson has failed to present such a case. Accordingly, the trial court properly denied his request for discovery.

C. Anderson was not entitled to discovery of any alleged exculpatory evidence.

¶16 Finally, as part of his request for discovery and pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963),[8] Anderson maintains that he is entitled to any exculpatory evidence tending to prove that he was not in the demanding state, including testimony taken at a John Doe proceeding in Jefferson County, Wisconsin.[9] The trial court denied his request concluding that because Anderson's petition for a writ of *habeas corpus* was insufficient and the proceeding would not advance to an evidentiary hearing, it need not address this discovery-related issue.

[8] Under the Fourth and Fourteenth Amendments to the United States Constitution, the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963).

[9] *See* WIS. STAT. § 968.26.

We agree and conclude that because Anderson's petition was insufficient in that he failed to overcome the presumption that he was in North Carolina on or about July 2, 1998, and, therefore, the proceeding would not advance to an evidentiary hearing requiring discovery, his request for exculpatory evidence is moot and was properly denied.

¶17 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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