COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP975-CR **Cir. Ct. No. 2004CF1418**

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

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

V.

KAREEM PERKINS A/K/A JERMAINE SIMMS,

DEFENDANT-APPELLANT.

APPEAL from an order[1] of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded with directions*.

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

[1] The notice of appeal refers to both the judgment of conviction and the postconviction order. However, this court is addressing only the trial court's denial of the postconviction motion.

¶1 KESSLER, J. Kareem Perkins a/k/a Jermaine Simms was convicted of two counts of being a felon in possession of a firearm and one count of possession of cocaine with intent to deliver (more than fifteen but less than forty grams), contrary to WIS. STAT. §§ 941.29(2) and 961.41(1m)(cm)3. (2003-04).[2] He appeals from an order denying his postconviction motion for DNA testing and postconviction relief. Perkins argues that the trial court erroneously exercised its discretion when it denied his motion to manually compare DNA found on a bullet-proof vest against the DNA of a man named Leon Q. Williams. We conclude that Perkins is entitled to an order allowing him to conduct the manual DNA comparison, pursuant to WIS. STAT. § 974.07(6). Therefore, we reverse and remand with directions that the trial court issue an order directing that the DNA test results from the vest and the DNA profile of Williams be made available to Dr. Alan Friedman, a private expert at Helix Biotech whom Perkins has selected.

BACKGROUND

¶2 Perkins was charged with two counts of being a felon in possession of a firearm and one count of possession of cocaine with intent to deliver. His case proceeded to trial before a jury. Detective Eric Donaldson testified that on March 9, 2004, he and other officers obtained permission to search a home located at 4054 North 19th Street in Milwaukee, which was the home of Perkins's sister and mother. Donaldson said that they found a bulletproof vest in a bedroom

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

closet, and that the vest contained two handguns, suspected cocaine packaged in corner cuts, and a wallet that belonged to Perkins.

¶3 DNA swabs were taken from the vest and the handguns. At trial, Elaine Canales Willson from the State Crime Lab testified that the results of DNA testing were inconclusive because there was not enough undamaged DNA to match or exclude Perkins. However, on redirect examination, Willson acknowledged that "[t]he sample from the vest perhaps could have been compared to other [DNA] samples" from other individuals. She explained that the vest sample would not be suitable for "entry into a data base" but "would only have to be done on a per sample basis. It could not be compared in a data base."

¶4 Perkins, who lived in Chicago, testified that he was at the house installing carpet for his sister when the police came into the house, grabbed him, took him outside and placed him in a police car. He testified that his wallet was in his pants when the police came into the house and that he was frisked before he was put in the police car. Thus, he implied that the police took his wallet and planted it in the pocket of the bulletproof vest that was found in the closet.

¶5 Perkins's sister, Rikeesha Tidwell, testified that Perkins did not reside in the home and was in the home laying carpet when the police arrived. She said she had seen her live-in boyfriend, Williams, with a bulletproof vest and that he kept his belongings in the closet where the vest was found.

¶6 Perkins was found guilty and was sentenced. He filed a postconviction motion pursuant to WIS. STAT. § 974.07, seeking a manual comparison of the DNA test results from the vest and the DNA profile of Williams, who was convicted of possession with intent to deliver cocaine in 2005, and therefore provided a DNA sample for the DNA data bank pursuant to WIS.

STAT. §§ 165.76 and 165.77. Perkins's motion stated that if the DNA comparison indicated that Williams's DNA was on the vest, he would seek a new trial.

¶7 The State opposed the motion. Ultimately, the trial court denied the motion, for reasons discussed below. This appeal follows.

STANDARD OF REVIEW

¶8 Resolution of this case requires statutory interpretation. The interpretation and application of statutes is a question of law that this court reviews *de novo*. ***State ex rel. Steldt v. McCaughtry***, 2000 WI App 176, ¶11, 238 Wis. 2d 393, 617 N.W.2d 201. Statutory interpretation "'begins with the language of the statute.'" ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "'If the meaning of the statute is plain, we ordinarily stop the inquiry'" and apply that meaning. ***Id.*** (citation omitted).

DISCUSSION

¶9 We begin our discussion with WIS. STAT. § 974.07, which provides several mechanisms for a criminal defendant to file a postconviction motion for DNA testing. A defendant may seek DNA testing at state expense pursuant to § 974.07(7).[3] Depending on the potential strength of the DNA evidence, the trial

[3] WISCONSIN STAT. § 974.07(7) provides:

> (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).

(continued)

court either *shall* or *may* grant the motion for testing at state expense. *See* § 974.07(7)(a) & (b) (emphasis added).

> 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.
>
> (b) A court in which a motion under sub. (2) is filed may order forensic deoxyribonucleic acid testing if all of the following apply:
>
> 1. It is reasonably probable that the outcome of the proceedings that resulted in the conviction, the finding of not guilty by reason of mental disease or defect, or the delinquency adjudication for the offense at issue in the motion under sub. (2), or the terms of the sentence, the commitment under s. 971.17, or the disposition under ch. 938, would have been more favorable to the movant if the results of deoxyribonucleic acid testing had been available before he or she was prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense.
>
> 2. The evidence to be tested meets the conditions under sub. (2) (a) to (c).
>
> 3. 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.

¶10 A defendant may also seek DNA testing that is not done at state expense, pursuant to WIS. STAT. § 974.07(6).[4] In ***State v. Moran***, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, our supreme court interpreted § 974.07(6), and in doing so recognized that its requirements were easier to satisfy than those outlined in § 974.07(7). *See* ***Moran,*** 284 Wis. 2d 24, ¶3. ***Moran*** held:

> [T]he plain language of § 974.07(6) gives a movant the right to conduct DNA testing of physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material, *if* the movant meets several statutory prerequisites. First, the movant must show that

[4] WISCONSIN STAT. § 974.07(6) provides:

> (a) Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:
>
> 1. Findings based on testing of biological materials.
>
> 2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.
>
> (b) Upon demand the movant or his or her attorney shall disclose to the district attorney whether biological material has been tested and shall make available to the district attorney the following material:
>
> 1. Findings based on testing of biological materials.
>
> 2. The movant's biological specimen.
>
> (c) Upon motion of the district attorney or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a) 2. and (b) 2. in order to protect the integrity of the evidence.
>
> (d) This subsection does not apply unless the information being disclosed or the material being made available is relevant to the movant's claim at issue in the motion made under sub. (2).

> the evidence meets the conditions under … § 974.07(2). Second, the movant must comply with all reasonable conditions imposed by the court to protect the integrity of the evidence. Third, the movant must conduct any testing of the evidence at his or her own expense. 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).

Moran, 284 Wis. 2d 24, ¶3 (emphasis in ***Moran***).

¶11 In this case, the stated basis for Perkins's postconviction motion concerning the DNA comparison was WIS. STAT. § 974.07(7), which provides for DNA testing at state expense if certain criteria are met.[5] However, once the State opposed the motion at the trial court, Perkins in his reply brief indicated that if the trial court declined to order the State Crime Lab to make the DNA comparison, "the court should at a minimum order that the DNA information be made available to Dr. Alan Friedman, a private expert at Helix Biotech." In doing so, Perkins implied that this cost would be borne by the state public defender's office, although he did not specifically say so. He did not explicitly cite § 974.07(6) as the basis for his request to have the information made available to a private expert.

¶12 The trial court decided Perkins's motion without a hearing. It concluded that Perkins was not entitled to testing at state expense pursuant to WIS. STAT. § 974.07(7) and, notably, did not discuss whether Perkins could conduct the manual comparison using a private lab pursuant to § 974.07(6). The trial court explained its reasons for denying the motion for testing at state expense:

[5] Both parties appear to assume that conducting a DNA comparison of two known DNA profiles, as opposed to creating new DNA profiles from biological samples, is included within the term "DNA testing" that is used in WIS. STAT. § 974.07. We agree.

> The court … finds the State's analysis persuasive. A DNA comparison would not exculpate the defendant. The evidence showed that the DNA recovered from the vest consisted of a mixture from two or more persons. Identifying Williams as one of the contributors would not exclude the defendant as a possible contributor. [Footnote inserted at this point stated: "The evidence at trial established that results of the DNA test on the vest were inconclusive. Thus, the defendant could not be included or excluded as a contributor to that DNA."] Moreover, because of the degraded nature of the DNA, a comparison would not include Williams. Consequently, the court finds that the defendant has not shown that the proposed DNA comparison would be exculpatory or that there is a reasonable probability that the outcome of the trial would have been different for purposes of ordering DNA testing under [WIS. STAT. § 974.07(7)(a) or (b)].

¶13 On appeal, Perkins asks this court to reverse the trial court's order, remand the case and direct the trial court to issue an order directing the State Crime Lab to do the manual DNA comparison of the existing DNA results from the vest and the now-available DNA profile of Williams, "and/or to make the data available to Dr. Alan Friedman, of Helix Biotech, a DNA expert retained by Mr. Perkins, for a comparison paid for by the State Public Defender."[6]

¶14 The State does not directly respond to Perkins's argument that he is entitled to conduct the DNA comparison pursuant to WIS. STAT. § 974.07(6). It briefly questions whether there is authority for a court to order that the DNA information on Williams that is maintained in the DNA data bank be released to anyone outside the data bank, citing WIS. STAT. § 165.77. However, the State

[6] Perkins suggests that we leave "[t]he determination of whether the testing/comparison is to be done pursuant to [WIS. STAT. §] 974.07(6) or 974.07(7)" to the discretion of the trial court. We reject this suggestion. Perkins seeks testing under either § 974.07(6) or (7). We conclude he is entitled to testing under § 974.07(6). There is no need for the trial court to consider the matter further.

does not discuss the potential applicability of § 974.07(6). Rather, the State argues that the trial court correctly denied Perkins's motion pursuant to § 974.07(7).

¶15 Thus, we are presented with a case where the trial court did not address the defendant's alternative request—which was made in a trial court reply brief without explicit reference to WIS. STAT. § 974.07(6)—to arrange for a private DNA comparison that was not at state expense, where the defendant reiterated that request on appeal, and where the State did not respond to that argument at the trial court or on appeal. Under these circumstances, we conclude that by not disputing Perkins's right to seek to conduct the DNA comparison on his own, pursuant to § 974.07(6), the State has, in effect, conceded this issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("'Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'") (citation omitted); *see also* ***State v. Krueger***, 2001 WI App 76, ¶67, 242 Wis. 2d 793, 626 N.W.2d 83 (where State failed to address defendant's arguments, arguments were deemed admitted).

¶16 Therefore, we reverse and remand with directions that the trial court issue an order directing that the DNA test results from the vest and the DNA profile of Williams be made available to Dr. Alan Friedman, a private expert at Helix Biotech whom Perkins has selected. Because we conclude that Perkins is entitled to arrange for his own expert to conduct the manual comparison pursuant to WIS. STAT. § 974.07(6), we do not consider whether he would also be entitled to an order to have the State Crime Lab conduct the test pursuant to § 974.07(7). *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

¶17 Finally, we address the State's brief argument that questions whether the DNA data bank is authorized to provide an analysis of Williams's DNA to anyone outside the data bank. The State asserts that WIS. STAT. § 165.77, the statute that addresses DNA analysis and the DNA data bank, has provisions for testing specimens and comparison to other samples, but does not explicitly authorize releasing DNA information to those outside the data bank. We reject this argument because the applicable statutes plainly contemplate testing by outside facilities and the release of DNA information to defense counsel.

¶18 WISCONSIN STAT. § 165.77(3) outlines procedures for testing and maintaining results of DNA samples provided by WIS. STAT. § 165.76, the statute pursuant to which Williams, as a convicted felon, was required to submit a DNA specimen. Section 165.77(3) provides:

> If the laboratories receive a human biological specimen under … [§]165.76 … the laboratories shall analyze the deoxyribonucleic acid in the specimen. *The laboratories shall maintain a data bank based on data obtained from deoxyribonucleic acid analysis of those specimens. The laboratories may compare the data obtained from one specimen with the data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data*. The data may be used in criminal and delinquency actions and proceedings. The laboratories shall destroy specimens obtained under this subsection after analysis has been completed and the applicable court proceedings have concluded.

Sec. 165.77(3) (emphasis added). We conclude that an order directing the state crime laboratories to provide defense counsel with the results of DNA testing falls clearly within the authorization to "*make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or*

delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data." *See* ***id.*** Further, we reject the State's suggestion that the trial court lacks authority to order that Perkins's defense expert be provided with the necessary data to conduct the manual DNA comparison, as WIS. STAT. § 974.07(6) authorizes such an order. *See* ***Moran***, 284 Wis. 2d 24, ¶3.

¶19 For the foregoing reasons, we conclude that Perkins is entitled to an order allowing his expert to conduct a manual DNA comparison, pursuant to WIS. STAT. § 974.07(6). We reverse and remand with directions that the trial court issue an order directing that the DNA test results from the vest and the DNA profile of Williams be made available to Dr. Alan Friedman, a private expert at Helix Biotech whom Perkins has selected. Consistent with § 974.07(8), the trial court may "impose reasonable conditions on any testing … in order to protect the integrity of the evidence and the testing process." *See* ***id.***

By the Court.—Order reversed and cause remanded with directions.

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