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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2007AP1413-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH ARMSTRONG,

Defendant-Appellant.

RESPONSE TO MOTION TO
SUPPLEMENT APPELLATE RECORD AND
ALTERNATIVE MOTION TO REMAND FOR FACT-FINDING

The State of Wisconsin, plaintiff-respondent, by its undersigned attorneys, hereby responds to Armstrong's motion to supplement the appellate record and alternative motion to remand for limited fact finding as follows:

1. The State opposes Armstrong's motion to supplement the appellate record with the three affidavits attached to the motion.

Contrary to Armstrong's assertion, these affidavits do not "establish" (Armstrong's motion at 1) that the State deliberately suppressed the information that in 1994 or 1995 Debbie Holsomback telephoned then Assistant District Attorney John Norsetter, who prosecuted Armstrong in 1981, and informed him that Ralph Armstrong's brother, Steve Armstrong, said he committed the rape and murder for which Ralph was in prison. The affidavits do not "establish" any facts or information that should be considered by this court in its evaluation of Armstrong's present fully briefed and submitted appeal, in which Armstrong is claiming his case should be dismissed with prejudice because the State destroyed potentially exculpatory evidence in bad faith.

The affidavits attached to Armstrong's motion do not establish any facts whatsoever. Affidavits by their very nature contain mere allegations of fact, allegations that are unconfirmed and unproven.¹ The State definitely does not concede that Mr. Norsetter ever received any information

¹The motion itself is replete with additional assertions of fact that are not contained in any signed and sworn affidavit; e.g., assertion at page 6 of Armstrong's motion that Steve's alleged statement included facts "consistent with both the publicly known and unknown facts of the Kamps homicide." Armstrong cites to *no* evidence in the trial court record that Kamps suffered any injuries consistent with Steve's alleged statement that he fixed razor blades on the end of a broken broomstick and used that to vaginally assault and sodomize the girl. See Cave Affidavit at ¶3, and Holsomback Affidavit at ¶6, both attached to Armstrong's motion.

regarding an alleged confession by Steve Armstrong. The State does not concede the accuracy, truth or credibility of the information asserted in the affidavits. The State does not concede that even if the facts in the affidavits were true, this court could therefrom draw the inference that Norsetter had a bad-faith motive or intent to destroy the potentially exculpatory DNA evidence at issue in the presently pending appeal.²

This court cannot supplement the appellate record with the affidavits submitted by Armstrong because the allegations in the affidavits have absolutely no relevance to the pending case. If the truth of the allegations set forth in the affidavits were ultimately proven, the proven facts might or might not have any relevance to the pending case. But determining the truth or lack of truth of the allegations in the affidavits would require extensive fact finding, including the making of credibility determinations and choosing between competing reasonable inferences to be drawn from the facts.

This appellate court does not have jurisdiction to make findings of fact where, as here, the evidence is contraverted. *Wurtz v. Fleischman*, 97

²Nor does the State concede that anyone else in the State connected to this case, including Assistant Attorney General Sally L. Wellman, ever received this information. See Armstrong's motion at page 9-10, ¶10.

Wis. 2d 100, 102, 107 n.3, 293 N.W.2d 155 (1980). This appellate court is not empowered to choose between competing reasonable inferences that can be drawn from the evidence. *See Bulik v. Arrow Realty, Inc.*, 154 Wis. 2d 355, 361, 453 N.W.2d 173 (Ct. App. 1990).

Moreover, in the presently briefed and submitted appeal, this court is reviewing the circuit court's order denying Armstrong's motion to dismiss his criminal case with prejudice. When the appellate court reviews a decision, judgment or order of the circuit court, it is limited to the record that was before the circuit court. *State v. Parker*, 2002 WI App 159, ¶12, 256 Wis. 2d 154, 647 N.W.2d 430. The appellate court is limited to the record and the record cannot be enlarged by materials that postdate the notice of appeal and were not made part of the record in the trial court. *Verex Assurance, Inc., v. AABREC, Inc.*, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989).

For all of these reasons, it would be wholly improper for this court to supplement the appellate record in the instant case with the affidavits submitted by Armstrong. The State, therefore, asks this court to deny Armstrong's motion to supplement the appellate record.

2. The State opposes Armstrong's alternative motion to remand to the circuit court "only for a limited fact-finding hearing" on the factual issue of whether Mr. Norsetter ever had the information regarding the alleged third-party confession and failed to disclose it, "to be returned for further consideration by this Court immediately thereafter." Armstrong's motion at 4.

Armstrong has failed to present sufficient justification to allow him to return to the circuit court to present evidence that he believes is relevant to his claim that the circuit court should have dismissed his criminal case with prejudice because the State destroyed potentially exculpatory evidence in bad faith. In support of his motion to supplement the record and alternative motion to remand for fact finding, Armstrong submitted an affidavit from present counsel (Affidavit of Attorney Jerome F. Buting, attached to Armstrong's motion). Buting's affidavit states in paragraph 3 that the information in the Affidavit of Fawn Cave came to his attention "at about the same time the Dane County Circuit Court ruled against Mr. Armstrong in his pretrial motions which are at issue in this appeal." The affidavit states that the other affiant, Debbie Holsomback, who had the alleged telephone conversation with the original trial prosecutor in Ralph

Armstrong's case, was located "[a]fter this matter was in the court of appeals." Buting's Affidavit at ¶3, attached to Armstrong's motion.

The circuit court's decision and order denying Armstrong's motion to dismiss was entered on April 12, 2007, and reentered June 18, 2007; Armstrong's petition for leave to appeal nonfinal orders was filed June 21, 2007, and was granted by this court August 22, 2007. Armstrong did not file the instant motion to supplement the appellate record and alternative motion to remand for fact finding until April 17, 2008, just over one year after the circuit court denied his motion to dismiss the case with prejudice.

Armstrong's claim that he delayed because he wanted to conduct further investigation is not sufficient to excuse his failure to bring this matter to the circuit court before he filed his petition for leave to appeal, so that the circuit court could reopen the matter and hear relevant testimony. Even if it was not feasible to raise the matter until after he obtained the information regarding Holsomback's alleged conversation with the trial prosecutor, Armstrong fails to satisfactorily explain why he did not immediately ask this court to allow the case to be returned to the circuit court so that all of the relevant facts could be heard and determined in the court that has jurisdiction to hold evidentiary hearings and make findings of fact.

Armstrong's desire to further investigate does not justify waiting to file his motion until after the appeal has been fully briefed and has been submitted to this court for decision.

More significantly, if this court remands,³ it should reject Armstrong's request that this court grant a remand "only" for a limited fact-finding hearing on the question of whether Norsetter had the alleged information and failed to disclose it. Armstrong's motion at 4.

Armstrong is attempting to insert this alleged new information into the instant appeal because he claims it is relevant to the legal questions before this court: whether the State destroyed potentially exculpatory evidence in bad faith and, if it did, whether his criminal case should be dismissed with prejudice. If the alleged new information is relevant to those legal issues, then the circuit court deserves the opportunity to consider all of the facts, including the new facts alleged by Armstrong and any facts the State wishes to present that are relevant to these legal issues. The circuit court also deserves the opportunity to reconsider the legal issues in light of all testimony and evidence presented at the remand hearing. If, as

³Pursuant to Wis. Stat. § 808.075(5)-(8), this court has authority to remand to the circuit court for action upon specific issues and to remand to the circuit court for additional proceedings while an appeal is pending.

Armstrong contends, the new alleged facts shed light on Norsetter's motive and intent relating to the re-testing of the DNA evidence at issue on appeal, and if, as he contends, the prosecutor's motive and intent are relevant to the claim of bad-faith destruction of exculpatory evidence and the claim that dismissal of the case with prejudice is warranted, then the circuit court must logically be allowed to address those legal issues after it makes the necessary determinations of credibility and fact finding regarding the new alleged misconduct. Intent and motive are questions of fact. This appellate court cannot make findings of fact. If the new alleged information is going to be injected into this pending appeal at all, the circuit court alone has jurisdiction to make factual findings regarding Norsetter's knowledge, intent and motive.

For all of these reasons, the State asks this court to deny Armstrong's alternative motion for limited remand. If this court retains jurisdiction of this appeal and remands, it should remand to allow the circuit court to hold a new evidentiary hearing on Armstrong's motion to dismiss the case with prejudice, at which both parties will be free to present any relevant testimony and evidence and to rebrief the legal issues in light of the facts presented at the evidentiary hearing. A transcript of that evidentiary hear-

ing should be filed in the circuit court, the parties should be permitted to file briefs in light of the evidence addressed at the evidentiary hearing, the circuit court should issue written findings of fact and legal conclusions based on its factual findings, and the clerk of the circuit court should then return the transcript of the evidentiary hearing, any briefs and the circuit court's written findings of fact and legal conclusions to this court for this court's further consideration of Armstrong's pending appeal.

3. As an alternative to denying Armstrong's motion to supplement the appellate record and motion for limited remand, and as an alternative to remand for a full hearing and reconsideration by the circuit court of the motion to dismiss the criminal case with prejudice in light of the new alleged facts, this court could dismiss Armstrong's present pretrial appeal. This would have the benefit of providing Armstrong an opportunity to file in the circuit court any and all further pretrial motions based on the alleged new information about the alleged third-party confession that he desires to file. All such motions could be heard, evidence could be presented and the motions could all be decided by the circuit court, and either party could seek an interlocutory appeal from any adverse ruling by the circuit court.

The State suggests this alternative because Armstrong's motion appears to hint at a number of distinct legal issues and potential claims, without fully explicating them and without articulating what remedy, ruling or relief is being sought. For example, Armstrong cites to foreign case law and suggests that the State's due process duty to disclose exculpatory evidence before and during trial also applies for some unspecified time after conviction. Armstrong's motion at 11-12. The State is unclear whether Armstrong is claiming the State violated a constitutional duty to disclose the alleged third-party confession information at the time it allegedly obtained the information in the spring or summer of 1994 or 1995, even though at that point Armstrong's direct appeal and first motion for new trial based on newly-discovered evidence were both completed and final.⁴

The motion suggests Armstrong is claiming that, even if the State did not have a duty to disclose after his direct appeal and his first motion for new trial based on newly-discovered evidence were completed, a duty to disclose came into being sometime between 2001 when he filed his

⁴The Wisconsin Supreme Court issued its decision in Armstrong's direct appeal in 1983. *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983). The court of appeals affirmed the denial of his first motion for new trial on June 17, 1993, and the Wisconsin Supreme Court denied his petition for review on December 14, 1993. *State v. Armstrong*, No. 1992AP232-CR (Wis. Ct. App. June 17, 1993) (unpublished slip opinion).

second motion for new trial based on newly-discovered evidence and the time the Wisconsin Supreme Court granted him a new trial in the interest of justice on July 12, 2005. *State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. If Armstrong is claiming a constitutional violation occurred sometime during that time period, he fails to articulate what if any relief is available because the Wisconsin Supreme Court has already granted what he claims he wanted: a new trial.

Armstrong's motion hints that he also believes the State violated a constitutional duty to disclose exculpatory evidence before or during trial because it failed to disclose the alleged third-party confession after the Wisconsin Supreme Court granted him a new trial in the interest of justice in July 2005. To the extent he is so claiming, he fails to articulate what if any remedy or relief he is seeking. The case is still in a pretrial posture, indeed the new trial is not even calendared yet, and Armstrong himself is asserting the alleged third-party confession exists, which establishes that he is aware of it well before trial.

Furthermore, the motion suggests Armstrong would want to present the alleged third-party confession as evidence of his innocence at his new trial. If so, vacating the present appeal would allow a pretrial motion to

admit that evidence to be litigated before trial. The losing party would have the opportunity to request interlocutory review of the ruling on such motion.

The State is certainly not suggesting that any or all of these motions would be warranted, and it certainly does not suggest that any of them would be successful. The State cannot discern to what extent Armstrong is attempting to raise any of those issues via the instant motion. To the extent that Armstrong may intend to raise any of these claims, it would be a more efficient use of court resources for his present appeal to be dismissed so that he can return to the circuit court to raise any and all motions he wishes to raise based in any way on new information about the alleged third-party confession.

4. The State opposes Armstrong's completely unsupported, unjustified and unauthorized request that

this Court should immediately take custody of the D.A.'s trial and post-conviction file in this case, copy it and seal it for safekeeping until further independent review can determine the true extent of this or any other *Brady*, due process or ethical violations. All documents which in any way relate to conversations, if any, with the affiant(s), and all documents concerning any investigations of Steve Armstrong should be promptly disclosed to the defense.

Armstrong's motion at 16.

Armstrong has not proven, and no court has found, that any past or present prosecutor in this case has committed any due process or ethical violation. Armstrong cites no statute or case law that authorizes this court to take custody of, copy and seal a prosecutor's files in the manner requested by Armstrong. Armstrong makes what appears to be a discovery request in the last sentence of his motion. Any discovery requests should be made to the prosecutor or to the circuit court, not to this appellate court.

CONCLUSION

For all of these reasons, the State hereby asks this court to deny Armstrong's motion to supplement the appellate record and alternative motion to remand for limited fact finding. If this court believes that remand is appropriate, it should remand for a plenary evidentiary hearing and reconsideration by the circuit court of Armstrong's motion to dismiss the criminal case with prejudice, and the circuit court clerk should return the case to this court with the transcript of that hearing, any briefs of the parties and the circuit court's findings of fact and conclusions of law based on the new evidentiary hearing. If this court believes that Armstrong is asserting other claims, such as a *Brady* claim, in addition to the three claims presently on appeal before this court, this court should dismiss the present

appeal. Armstrong can then raise all claims that he wishes to raise in the circuit court, which has the authority and jurisdiction to hold evidentiary hearings and make findings of fact. This court should deny Armstrong's request that it confiscate, copy and seal the prosecutor's trial and post-trial file. This court should also deny Armstrong's request for a discovery order, to the extent the last sentence in his motion constitutes such a request.

Dated this 24th day of April, 2008.

Respectfully submitted,

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