

1 STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
2 BRANCH 1

3 STATE OF WISCONSIN,

4 PLAINTIFF, MOTION HEARING

5 vs. Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

8 **DATE:** DECEMBER 20, 2006

9 **BEFORE:** Hon. Patrick L. Willis
10 Circuit Court Judge

11 **APPEARANCES:** KENNETH R. KRATZ
12 Special Prosecutor
On behalf of the State of Wisconsin.

13 THOMAS J. FALLON
14 Special Prosecutor
On behalf of the State of Wisconsin.

15 NORMAN A. GAHN
16 Special Prosecutor
On behalf of the State of Wisconsin.

17 DEAN A. STRANG
18 Attorney at Law
On behalf of the Defendant.

19 JEROME F. BUTING
20 Attorney at Law
On behalf of the Defendant.

21 STEVEN A. AVERY
22 Defendant
Appeared in person.

23 **TRANSCRIPT OF PROCEEDINGS**

24 Reported by Diane Tesheneck, RPR

25 Official Court Reporter

1 THE COURT: At this time the Court calls
2 State of Wisconsin vs. Steven Avery Case No. 05 CF
3 381. This matter is scheduled for a status
4 conference today. And I will indicate for the
5 record that I met with counsel before we began today
6 and they informed me of the status conference.
7 There were a few matters to take up on the record.
8 Will the parties state their appearances for the
9 record, please.

10 ATTORNEY KRATZ: Your Honor, the state
11 appears by Calumet County District Attorney Ken
12 Kratz appearing as Special Prosecutor. Also special
13 Prosecutors Norm Gahn and Tom Fallon.

14 ATTORNEY BUTING: Good morning, your Honor,
15 Buting and Williams by Attorney Jerome Buting
16 appearing on behalf of Mr. Avery. Also Dean Strang
17 appearing on behalf of Mr. Avery. Mr. Avery is
18 present in court.

19 THE COURT: Very well. Mr. Buting, I
20 believe you indicated you wish to take up a matter
21 concerning a motion recently filed by the defense.

22 ATTORNEY BUTING: Yes, Judge, we filed --
23 the defense filed, on December 6, a motion to allow
24 the Court to grant us access to a particular exhibit
25 that we discovered has been sitting in the Clerk's

1 Office in Manitowoc County, in Mr. Avery's 1985
2 wrongful conviction case. We discovered that a vial
3 of his blood, or what we believed was a vial of his
4 blood, was in a box in that file. And we filed a
5 motion.

6 We could see that the box itself, the
7 seal, the evidence tape seal, had been broken and
8 that it had been resealed with a piece of scotch
9 tape. We did not want to open that to see if
10 there really was a vial of his blood in that box
11 until the Court allowed us. So we filed this
12 motion.

13 The Court initially sealed it. I
14 understand the Court is unsealing it today. The
15 Court granted the defense request. The parties,
16 including the prosecution team, went to the
17 Clerk's Office last week. The box was opened and
18 there was, inside of it, a styrofoam box that had
19 also at one point been sealed with evidence tape.

20 That evidence tape had been opened, cut
21 open, and inside the styrofoam package was a
22 liquid vial of Mr. Avery's blood, in a tube, that
23 also was unsealed, and therefore available to
24 anyone who would want to use it to plant evidence
25 against Mr. Avery in this case.

1 We filed our motion and set forth some
2 of the links that we believe will establish at
3 trial. And the issues that remain now are
4 whether or not any sort of forensic tests can be
5 done on the blood that will shed any further
6 information for either party and that is
7 something that the State and I will be working on
8 in the next week.

9 THE COURT: All right. Mr. Gahn, are you
10 handling this one for the State?

11 ATTORNEY GAHN: Yes, I am, your Honor.

12 THE COURT: With respect to the defendant's
13 motion, specifically, what's going to be done with
14 this blood, what's the State's position.

15 ATTORNEY GAHN: Your Honor, the State's
16 position is that we would like to have access to
17 that vial of blood. Our initial investigation in
18 looking into this matter has revealed that although
19 we cannot determine who was the source of drawing of
20 this blood and that there may be some questions on
21 chain of custody. At this point we just haven't had
22 time to fully investigate this matter.

23 In any event, we would like to have
24 access to the blood. There is some chemical
25 testing that we would like to do with this blood.

1 We're confident that the testing that we
2 anticipate doing is going to show that this blood
3 had absolutely nothing to do with the case that
4 is in front of this Court.

5 And we also are in the process of
6 interviewing individuals who did have contact
7 with that blood and -- but that was under the
8 Court's approval back in Manitowoc County and
9 that the individuals who did unseal the blood, it
10 was done under the auspices of a court, and there
11 was nothing really surreptitious, or some type of
12 lapse of security where this could be taken or
13 planted. And we're confident we'll be able to
14 show that.

15 But in order to do that, we would ask
16 the Court to unseal that blood and give us access
17 to it so that we can send this for testing.
18 We're so confident in our position that we're
19 more than willing to split that sample, if the
20 Court wishes, with the defense. In any event, we
21 certainly would like to get on with the testing
22 that we believe will show that this vial of blood
23 had absolutely nothing to do with the case before
24 us.

25 THE COURT: All right. With respect to how

1 this matter is to be handled, Mr. Buting, has the
2 defense determined yet whether or not it wishes to
3 test the blood?

4 ATTORNEY BUTING: Judge, it's my
5 understanding, I don't believe there are any tests
6 that can be done on this vial of blood that are
7 really going to shed any more light to either side.
8 I may be wrong, Mr. Gahn may find someone who thinks
9 that something else can be done. But I very much
10 object to unsealing the evidence and allowing the
11 State to have free access to this blood at this
12 time.

13 What we discussed in chambers I think is
14 a fair way to deal with this, which is that
15 Mr. Gahn and I will talk between now and the end
16 of the year, December 31st, to see if there is a
17 joint proposal we can present to the Court. But
18 my feeling at this time is if there is any
19 transfer of that evidence, I want notice to the
20 defense, I want potentially a representative from
21 the defense present during change of custody, if
22 not even perhaps during the testing itself.

23 But I think we can work that out between
24 the two of us. And if we can't, then we can
25 bring it back to the Court for a decision on how

1 it should be handled. At this time, though, I do
2 strongly urge the Court to keep this evidence
3 locked in the safe at the Clerk's Office in
4 Manitowoc County.

5 THE COURT: All right. Mr. Gahn.

6 ATTORNEY GAHN: May I address that, your
7 Honor?

8 THE COURT: Go ahead.

9 ATTORNEY GAHN: What I would ask the Court
10 to do is this. Again, as we're confident in our
11 position with this vial of blood, I would ask the
12 Court to -- what would be the mechanism. Assume
13 that firstly, wherever we find a place to send this
14 blood, I will call Mr. Buting. They would be
15 welcome to accompany our people, or whoever is doing
16 the testing. They would be welcome to hire an
17 expert to watch the testing. They could even send
18 someone along to accompany the vial of blood
19 wherever it goes. We'll make that opportunity
20 available to them.

21 My concern is this, we're coming up
22 quickly upon this trial date. And there are some
23 places that I believe we may be able to send this
24 vial of blood. Assume that this Friday I come up
25 with a place that I believe is going to give us

1 the -- accomplish the testing that we believe
2 would be appropriate in this case. I will notify
3 Mr. Buting where that will be. And he will be
4 welcome to send his expert or his people along.

5 And the main thing I'm concerned is, if
6 I want to send one of our investigators to
7 Manitowoc County to get that blood, will we be
8 able to have access to it. That's why I'm asking
9 that that be unsealed and the Manitowoc County
10 officials know that, should a representative from
11 the State, and it may either be a Calumet County
12 sheriff or someone from DCI to come to pick up
13 that blood and they can take that blood from the
14 safe.

15 ATTORNEY BUTING: And that's exactly what I
16 don't want to happen. If something happens this
17 Friday, then Mr. Gahn can contact me. If we reach
18 agreement, we can certainly notify the Court by
19 stipulation. You know, we could fax, email motions
20 back and forth. And the Court could certainly sign
21 an order promptly. I don't see that there is any
22 need at this time to say -- to give carte blanche
23 access to this.

24 I have had this experience in other
25 counties, that the only way that I know of that

1 you can insure that the defense is notified --
2 sometimes the Clerk doesn't realize that that's
3 part of the requirement and they go ahead and
4 release it to the State without telling us. The
5 only way to do it, it is in a secured place now,
6 sealed in a safe, with very -- we hope very
7 limited access. And it should remain that way
8 until -- unless and until the State can find
9 somebody, if they wish, who is going to do some
10 of the tests.

11 And with regard to the closeness of
12 trial, this has been sitting in the Clerk's
13 Office throughout the time of this prosecution.
14 This was not some hidden evidence that the
15 defense is dumping on the State at the last time.
16 They had every bit the same opportunity we did to
17 go search the record, particularly since
18 Mr. Avery and his family, from the very
19 beginning, have been claiming that the blood was
20 planted against him by someone in this case.

21 And now we discovered that blood did
22 exist where that could have happened. It was
23 unsealed. The seals have been broken. And I
24 think that the parties can work this out. If
25 Mr. Gahn is concerned about the delay, part of

1 that is because they just chose not to
2 investigate the case and Mr. Avery's claims
3 thoroughly, like they should have.

4 THE COURT: All right. I will make the
5 following observations. And I hear the parties, I
6 don't understand really there to be a dispute
7 between the two parties as to the mechanism for
8 testing the blood. The defense doesn't feel it
9 necessary for the blood to be tested. The State
10 indicates it does and is willing to allow the
11 defense to participate in really, without
12 restriction, in overseeing and the testing of the
13 blood.

14 And the defense is indicating, if the
15 blood is tested, that's what it wants. So I'm
16 anticipating that the parties are going to reach
17 an agreement here. I will give you until --
18 December 31st is a Sunday, yes, Sunday. So I
19 will give you until Tuesday, the 2nd, to agree.

20 If the parties don't agree, the State
21 can file a motion to examine the blood on such
22 terms as it deems appropriate. And the Court
23 will take up that motion and set it for a hearing
24 in very short order, if that's determined to be
25 necessary. But I have to say, based on what I

1 hear the parties telling me on the record today,
2 I'm not sure why that should be necessary.

3 ATTORNEY GAHN: Your Honor?

4 THE COURT: Yes.

5 ATTORNEY GAHN: May we also have relief
6 from your January 19th date where you set that for
7 the turnover, the list of rebuttal witnesses. Since
8 I don't know if we'll be able to make that date, I
9 would like to have relief from that also.

10 And the other final question I have is,
11 assume on Friday there is a place we want to send
12 this blood, is it -- would the mechanism of
13 getting that blood into one of our sheriff's or
14 DCI agent's custody to get it into the mail,
15 simple as I will call Mr. Buting, we try to do a
16 conference call Friday, and would it be as simple
17 as you making a phone call to Manitowoc County
18 saying so and so is going to come down on this
19 date, say next Tuesday, you may release it to
20 him. Is it that simple?

21 THE COURT: Well, you can fax me a
22 stipulation. And certainly based on the
23 stipulation, I can order that it be released under
24 the terms of your stipulation. If you don't reach a
25 stipulation, then it gets a little more complicated.

1 With respect to the rebuttal witnesses,
2 before I would allow a party to have relief from
3 the deadline that's been set, I would like to
4 make alternative arrangements for when the
5 rebuttal witnesses would be notified.

6 I will say on the record, that based on
7 the late notice to the State of the development
8 of this evidence, that certainly sounds like
9 grounds for from relief from the existing
10 deadline. But as far as acting on the motion
11 that you just made on the record, I would take
12 that up at such time as it's coupled with a
13 description of when the notice would be provided.

14 Is there anything else that either party
15 wishes to take up on the record at this time? It
16 was my understanding that the State, specifically
17 Mr. Kratz, was looking for some clarification of
18 discovery items.

19 ATTORNEY KRATZ: I am, Judge. In chambers
20 we discussed the lack of materials being provided to
21 the State on February 1st. The State filed a
22 reciprocal discovery demand with the defense. It
23 was our hope that by the 15th of December, the date
24 that the Judge had ordered for exchange of
25 discovery, that we would have received the witness

1 statements, or reports from investigators that
2 summarize the statements from witnesses.

3 We understand that expert reports may
4 accompany an expert witness list sometime in
5 early January. But the lay materials we had
6 hoped would have been provided by the 15th, and
7 if they are forthcoming, we would appreciate
8 notice of that fact.

9 THE COURT: Mr. Strang.

10 ATTORNEY STRANG: The State had every right
11 to expect that by December 15. Indeed, the Court's
12 order set that as a general discovery deadline. I
13 dropped the ball, or let it pass, being focused on
14 the witness list at the time. We have a limited
15 amount of material that I think does fall within the
16 discovery statute. We discussed this in chambers.
17 And I will make every effort to get that to
18 Mr. Kratz, if not this week, then certainly between
19 Christmas and New Years.

20 THE COURT: Mr. Kratz, anything else?

21 ATTORNEY KRATZ: No, Judge. If I get it by
22 the first of the year, that will provide plenty of
23 opportunity for preparation. Thank you, Judge.

24 THE COURT: Very well. Is there anything
25 else either party wishes to bring up on the record

1 at this time?

2 ATTORNEY KRATZ: Could we just have a
3 moment, Judge?

4 THE COURT: Yes.

5 ATTORNEY KRATZ: We understand, Judge, that
6 some scheduling of logistic matters will be
7 addressed by the Court later on today in a meeting.
8 And there were some other scheduling and other
9 agreements that were placed -- or were discussed in
10 chambers, but nothing that I believe needs to be
11 placed on the record at this time.

12 THE COURT: Thank you. Mr. Strang.

13 ATTORNEY STRANG: The only other matter I
14 would have to raise, your Honor, is just a
15 reiteration of our concern and our request that in
16 any proceeding, telephonic or otherwise, in which
17 the Court and the parties go beyond a discussion
18 strictly limited to scheduling, we would like
19 arrangements to be made for the participation in
20 person or by telephone of Mr. Avery.

21 I realize that the schedule is fluid and
22 that the Court may have to convene other
23 hearings. Purely scheduling matters, of course,
24 need not involve Mr. Avery. But to the extent we
25 get into anything other than scheduling, we

1 simply reiterate the request that he be included,
2 present in some practical fashion.

3 THE COURT: All right. Well, certainly
4 there is a statute, aside from fundamental fairness,
5 that requires that that take place. And if there is
6 anything else that we have to go on record for that
7 doesn't involve scheduling, that's what we'll do.
8 Today's hearing was only scheduled to be a status
9 conference, but the parties notified the Court ahead
10 of time that there were some items to be dealt with
11 on the record and that's how we wound up here today.
12 If necessary, we'll do that again in the future.

13 ATTORNEY STRANG: Thank you.

14 THE COURT: Anything else today?

15 ATTORNEY KRATZ: Not on the record, Judge.

16 THE COURT: Very well. If not, we're
17 adjourned for today.

18 ATTORNEY BUTING: Thank you, Judge.

19 THE COURT: Let's go back on the record.
20 Mr. Buting, you had a clarification question?

21 ATTORNEY BUTING: Just the -- did the Court
22 rule then that the motion we filed is going to be
23 unsealed, or is unsealed?

24 THE COURT: I intend to issue that order to
25 unseal the motion.

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ATTORNEY BUTING: Okay.

THE COURT: With respect to the evidence that's the subject matter of the motion itself, I indicated that I would withhold ruling on that at this time pending what I anticipate will be an agreement between the parties. And if the parties do not come to an agreement, and the State asks for a motion to have the evidence unsealed, I will rule on that motion when it comes in.

ATTORNEY BUTING: So, in the meantime, the evidence that's the subject of the motion will remain sealed?

THE COURT: Yes.

ATTORNEY BUTING: Thank you. I just wanted to clarify that.

THE COURT: Very well. We're adjourned for today.

(Proceedings concluded.)

1 STATE OF WISCONSIN)
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2 COUNTY OF MANITOWOC)

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I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this day of , 2007.

Diane Tesheneck, RPR
Official Court Reporter

<p>D</p> <p>discussion [1] 14/17 dispute [1] 10/6 District [1] 2/11 do [13] 4/25 5/3 5/15 5/23 7/1 7/10 9/5 9/9 11/15 15/7 15/12 16/7 17/6 does [2] 10/10 13/15 doesn't [3] 9/2 10/8 15/7 doing [2] 5/2 7/15 don't [7] 6/5 8/16 8/21 10/6 10/20 11/8 11/24 done [5] 4/5 4/13 5/10 6/6 6/9 down [1] 11/18 drawing [1] 4/19 dropped [1] 13/13 dumping [1] 9/15 during [2] 6/21 6/22</p>	<p>forth [2] 4/1 8/20 forthcoming [1] 13/7 free [1] 6/11 Friday [4] 7/24 8/17 11/11 11/16 front [1] 5/4 fully [1] 4/22 fundamental [1] 15/4 further [1] 4/5 future [1] 15/12</p>	<p>initial [1] 4/17 initially [1] 3/13 inside [2] 3/18 3/21 insure [1] 9/1 intend [1] 15/24 interviewing [1] 5/6 into [4] 4/18 11/13 11/14 14/25 investigate [2] 4/22 10/2 investigation [1] 4/17 investigators [2] 8/6 13/1 involve [2] 14/24 15/7 is [44] issue [1] 15/24 issues [1] 4/3 it [36] it's [2] 6/4 12/12 items [2] 12/18 15/10 itself [3] 3/6 6/22 16/3</p>
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