



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 25, 2019

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
1010 S. 8th Street
Manitowoc, WI 54220-5380

Lisa E.F. Kumfer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jacalyn C. LaBre
District Attorney
1010 S. Eighth St.
Manitowoc, WI 54220

Steven G. Richards
Everson & Richards, LLP
127 Main St.
Casco, WI 54205

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kathleen T. Zellner
Kathleen T. Zellner and Associates, P.C.
1901 Butterfield Rd., Ste. 650
Downers Grove, IL 60515

You are hereby notified that the Court has entered the following order:

2017AP2288

State of Wisconsin v. Steven A. Avery (L.C. # 2005CF381)

Before Reilly, P.J.

Steven A. Avery, by counsel, appeals from the circuit court's denial of his WIS. STAT. § 974.06 postconviction motions. He moves this court to stay the appeal and remand to the circuit court so that he may raise new claims premised on the recent discovery of "a previously undisclosed police report" dated September 20, 2011, which, according to Avery's appellate counsel, reflects law enforcement's "transfer of multiple suspected human bones from the Manitowoc County Gravel Pit to Wieting Funeral Home for return to [Teresa] Halbach's

family.” Avery alleges that the State violated its statutory duty to preserve evidence, *see* WIS. STAT. § 968.205, and that the State’s actions violated Avery’s constitutional due process rights, *see Youngblood v. Arizona*, 488 U.S. 51 (1988).

The State has filed an objection to Avery’s remand motion on the ground that it constitutes “a new and separate action” which is unrelated to the orders Avery presently appeals, is unnecessary to the resolution of his pending appeal, and “would result in unnecessary delay and litigation.” The State’s objection points out that this is, in effect, Avery’s third remand request. The State’s objection does not address the merits of Avery’s claimed statutory and constitutional violations, and it has not responded to Avery’s supplemental filings alleging the possible destruction of evidentiary items which, it appears, the parties previously agreed to preserve.

The State suggests that the appeal is languishing and that if Avery wishes to pursue new claims outside the scope of the WIS. STAT. § 974.06 postconviction orders presently on appeal, he could dismiss the pending appeal, or wait until its conclusion to file his new claims. As to the former, Avery understandably disagrees, aware that dismissing this appeal will preclude review of the underlying orders entered to date.

Having considered the parties’ submissions, we determine that the best course of action is to grant Avery’s motion to stay the appeal and to remand under WIS. STAT. § 808.075(5) “for action upon specific issues.” As the State’s response acknowledges, the decision to remand is left to this court’s discretion. *See* § 808.075(6). Though we are not required to remand, we determine that this procedure strikes an appropriate balance given the specific circumstances of this case. Due to this case’s extensive history, there is a benefit to having existing claims

developed or litigated while they are relatively fresh, rather than positioning the claims to be procedurally barred in a future proceeding. For these reasons, we desire a ruling on the merits so that all claims to date can be considered in a single appeal. The briefing in this appeal has not commenced. There appears to be some potential overlap between the “old” and “new” issues. Therefore,

IT IS ORDERED that this appeal is remanded forthwith to the circuit court to permit Steven A. Avery to pursue a supplemental postconviction motion raising “claims for relief in connection with the State’s violation of WIS. STAT. § 968.205 and *Youngblood v. Arizona*.”

IT IS FURTHER ORDERED that any supplemental postconviction motion shall be filed in the circuit court within fourteen days.

IT IS FURTHER ORDERED that the circuit court shall conduct any proceedings necessary to address the claims raised in the supplemental postconviction motion, and shall enter an order containing its findings and conclusions.

IT IS FURTHER ORDERED that if a party intends to order a transcript of any post-remand hearing, the party shall do so within ten days after the circuit court enters its order deciding the supplemental postconviction motion. The ordering party shall file a statement on transcript. Any such transcript shall be filed and served within thirty days after its request. The ordering party shall provide the court reporter with a copy of this order.

IT IS FURTHER ORDERED that the circuit court clerk shall re-transmit the record to this court within twenty days after the later of the entry of the circuit court order deciding the

supplemental postconviction motion or the filing of any post-remand hearing transcript, if ordered. The record shall include any papers filed pursuant to this remand.

IT IS FURTHER ORDERED that the appeal is stayed until the return of the record following remand.

IT IS FURTHER ORDERED that the appellant shall file an appellant's opening brief presenting all grounds for relief within forty days after the return of the record.

Sheila T. Reiff
Clerk of Court of Appeals