

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2017AP2288

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JAN 29 2019

CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

**RESPONSE IN OPPOSITION TO AVERY'S THIRD
PETITION TO STAY THE APPEAL AND REMAND
THIS CASE TO THE CIRCUIT COURT**

INTRODUCTION

Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant Steven A. Avery's petition to stay this appeal and remand the case to the circuit court for consideration of a new Wis. Stat. § 974.06 motion.

As explained in this Court's order denying Avery's last motion to remand this case, the issue before this Court is

whether the circuit court properly denied Avery's previous Wis. Stat. § 974.06 motions without a hearing. The issue Avery claims he would like to pursue in a new Wis. Stat. § 974.06 motion is not a specific issue related to Avery's prior Wis. Stat. § 974.06 motions. Rather, it is a new claim, and, as Avery admits, it is related to his desire to pursue postconviction DNA testing. (Avery's Motion 4-5.)

As with his prior request to stay this appeal in order to litigate a Wis. Stat. § 974.07 postconviction motion for DNA testing, remanding this case to the circuit court to allow Avery to develop an entirely new constitutional claim related to his desire to pursue DNA testing is not necessary to decide this appeal.

Staying this appeal and remanding for the litigation of such a motion would result in unnecessary delay and litigation. As noted previously, this appeal has been languishing for over a year. If Avery no longer wishes to challenge the denial of his previous motions, but instead litigate an entirely new Wis. Stat. § 974.06 motion, he can voluntarily dismiss this appeal and pursue that action in the

circuit court. It is inappropriate, however, for Avery to continue to ignore the Wisconsin rules of procedure—to which every other defendant and the State are expected to adhere—and perpetually delay this appeal by repeatedly seeking remand for litigation of issues unrelated to the circuit court's denial of his motions.

If Avery does wish to continue with this appeal, the sole question is whether the court properly denied his previous motions and supplements. Avery should either voluntarily dismiss this appeal to litigate a new Wis. Stat. § 974.06 motion now, or to wait until this appeal is resolved to bring that motion or to raise any other issue that was not included in his previous motions.

BACKGROUND

In 2007, a jury convicted Avery of first-degree intentional homicide for the murder of Teresa Halbach and for possession of a firearm as a felon. His direct appeal concluded when the Wisconsin Supreme Court denied his petition for review in 2011.

In June 2017, Avery filed the Wis. Stat. § 974.06 motion at issue in this appeal alleging that a multitude of constitutional errors occurred in his prior proceedings. The circuit court denied his motion without a hearing on October 3, 2017. Avery then filed a motion to reconsider and several supplements to that motion, which the circuit court also denied without a hearing, on November 28, 2017. Avery filed a notice of appeal from the circuit court's final written order on November 30, 2017.

On June 7, 2018, this Court retained jurisdiction, but remanded this case to the circuit court to allow Avery to file a supplemental Wis. Stat. § 974.06 motion to litigate a *Brady v. Maryland*, 373 U.S. 83 (1963), claim. The circuit court denied that motion without a hearing as well, and the record was transmitted back to this Court on September 25, 2018.

On December 17, 2018, Avery filed a petition to stay this appeal and remand the case to the circuit court for Avery to litigate a motion for postconviction DNA testing of bone fragments collected before trial, pursuant to Wis. Stat. § 974.07. On December 28, 2018, this Court denied the

petition, stating that “[t]he scope of this appeal is limited to a review of the circuit court’s orders denying Avery’s Wis. Stat. § 974.06 motions,” and therefore “[g]ood cause to remand [had] not been shown.” This Court gave Avery a further extension, to February 1, 2019, to file his initial brief.

On January 25, 2019—a week before his initial brief was due—Avery filed another motion to stay this appeal and remand the case to the circuit court. This time, he seeks to pursue a new claim that the State violated his due process rights by releasing a portion of potentially human bone fragments to the Halbach family for burial, roughly five years after Avery’s trial.

RELEVANT LAW

Avery is permitted to petition this Court “for remand to the circuit court for action upon specific issues” pursuant to Wis. Stat. § 808.075(5). The decision to remand is left to this Court’s discretion. *See* Wis. Stat. § 808.075(6) (using the word “may” in respect to this Court’s authority to remand).

ARGUMENT

Avery asks this Court to stay his appeal and remand his case to the circuit court so he can litigate a new Wis. Stat. § 974.06 motion.¹ The claim Avery wishes to raise is that the State violated his constitutional right to due process of law, pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), by releasing a portion of possibly human bone fragments to the Halbach family for burial in 2011. This claim is just as far afield from the issues in this appeal as the claim underlying Avery's previous request for remand to litigate a Wis. Stat. § 974.07 (postconviction DNA testing) motion.

As before, Avery's motion does not identify a "specific issue" related to Avery's Wis. Stat. § 974.06 motions that are under review in this appeal. Rather, Avery admits that this is a new issue that counsel purportedly "uncovered" on January 24, 2019. (Avery's Motion 1, 8.) Avery claims that he

¹ Avery does not explicitly state this; however, the only procedural mechanism for raising a constitutional due process claim now that his direct appeal has concluded would be via a Wis. Stat. § 974.06 motion.

is seeking remand because “[h]e does not want to waive this issue by not addressing it at this time.” (Avery’s Motion 20.)

However, a Wis. Stat. § 974.06 motion “may be made at any time.” Wis. Stat. § 974.06(2). And, if “the court finds a ground for relief asserted which for sufficient reason was not asserted” in a previous Wis. Stat. § 974.06 motion, the new motion is not subject to the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Wis. Stat. § 974.06(4); see *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668.

If Avery can establish a sufficient reason for failing to raise this claim in the motions currently under review, the claim will not be barred, and he can file a new Wis. Stat. § 974.06 motion once this appeal has concluded. If he cannot establish a sufficient reason for failing to raise this claim earlier, the claim is already waived, and the procedural bar already applies. *State v. Lo*, 2003 WI 107, ¶ 44, 264 Wis. 2d 1, 665 N.W.2d 756.

As with Avery’s previous request, staying this appeal and remanding the case to the circuit court under these

circumstances would not address a “specific issue” related to the order Avery is appealing, but would instead be a remand for a new, separate action in the circuit court.

As explained in the State’s most recent response opposing Avery’s most recent remand motion, in all of the published cases addressing staying an appeal and remanding to the circuit court for additional proceedings, the remand was to address a specific issue related to the claims already before the court of appeals. *See In re Pharm*, 2000 WI App 167, ¶ 7, 238 Wis. 2d 97; 617 N.W.2d 163; *State v. Yang*, 201 Wis. 2d 725, 743 n.8, 549 N.W.2d 769 (Ct. App. 1996);² *In re Commitment of Matthew A.B.* 231 Wis. 2d 688, 697, 605 N.W.2d 598 (Ct. App. 1999).

The litigation of a new, separate Wis. Stat. § 974.06 motion on entirely new grounds is not a “specific issue” related to the order Avery is appealing. It is a new action, and a stay and remand is not appropriate. As noted, this appeal has been languishing for over a year, without any brief yet

² The stay and remand in *Yang* was granted and then rescinded.

filed. Avery's perpetual delay of this appeal by continually requesting remands to the circuit court to litigate new issues unrelated to the circuit court's denial of the Wis. Stat. § 974.06 motion at issue here must end.

If Avery no longer wishes to challenge the circuit court's decision denying the Wis. Stat. § 974.06 motion at issue here, and instead wishes to litigate a Wis. Stat. § 974.07 motion or a new Wis. Stat. § 974.06 motion, he may voluntarily dismiss this appeal. The process of winnowing out weaker appellate claims and focusing on those more likely to prevail "is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Alternatively, if he does not wish to give up his challenge to the court's denial of the motions at issue here, he must wait until this appeal is resolved and then determine how he wishes to proceed.

Either course of action would be appropriate. Staying the appeal and remanding the case to the circuit court for fact-finding on an issue wholly unrelated to the order being appealed, however, is not. Avery's continued attempts to hold

this appeal in indefinite abeyance while he searches for new issues he did not raise before the circuit court is inappropriate. Wis. Stat. §§ (Rule) 809.19(1), 809.83(2). His appeal is from the trial court's decision to deny his previous motions without a hearing. It is time for this appeal to move forward.

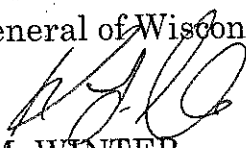
CONCLUSION

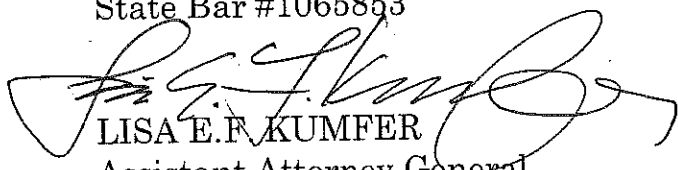
The litigation of a new Wis. Stat. § 974.06 motion is not a “specific issue” related to the order Avery is appealing; it is a new and separate action in the circuit court. Avery has alternative courses of action that do not require further delay to this appeal. This Court should deny Avery’s petition.

Dated this 29th day of January, 2019.

Respectfully submitted,

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