**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 16, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-0066** **Cir. Ct. No. 93-CF-199**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TROY NMI KEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Troy Key appeals pro se from an order denying his motion for postconviction discovery. We conclude that the trial court's determination that the sought-after evidence would not produce a different result at trial is not clearly erroneous. We affirm the order.

¶2 In 1993, Key was convicted of first-degree intentional homicide for fatally stabbing bartender Rick Blundon. Key's conviction was affirmed on appeal. ***State v. Key***, No. 95-2624-CR, unpublished slip op. (Wis. Ct. App. Oct. 30, 1996). In May 2000, Key filed a pro se motion for postconviction discovery. Key sought to have tests conducted on blood on a towel found in his car after the stabbing and blood on Blundon's shirt. Concluding that the evidence would not affect the outcome, the trial court denied the motion for discovery.

¶3 Postconviction discovery may be obtained upon a showing of materiality. ***State v. O'Brien***, 223 Wis. 2d 303, 319-20, 588 N.W.2d 8 (1999). Sought-after evidence is material, that is, relevant to an issue of consequence, when there is a reasonable probability that its disclosure would produce a different outcome of the case. ***Id.*** at 320-21. We will not set aside the trial court's determination as to the materiality of evidence sought to be discovered in postconviction proceedings unless it is clearly erroneous. ***Id.*** at 322.

¶4 Key wants to test the blood on the towel found in his car to establish that it was not Blundon's blood. In his opinion, this will contradict the lab results offered at trial by stipulation. The stipulation informed the jury that Blundon could be included as a possible source of the blood on the towel but that the results were inconclusive because approximately 59% of the white population and 66% of the black population have a blood type containing the enzymes found on the towel. The actual source of the blood on the towel was not confirmed.

¶5 In Key's first appeal, this court rejected a claim that the stipulation about the inconclusive lab results was highly prejudicial to Key because it implied that the blood was Blundon's. We held that "[t]he lab results did not prejudice Key on the disputed element of intent to kill." ***Key***, slip op. at 7. The

impeachment of evidence which was not prejudicial in the first instance is not material.

¶6 Moreover, the trial court noted that information regarding the towel comprised only two pages of over 1,000 pages of trial testimony, including eyewitness accounts of Key's confrontation with Blundon. The towel was not mentioned in closing arguments and the prosecution never argued that the towel demonstrated Key's intent to return to the bar and kill Blundon.[1] In any event, Key's argument rests on the assumption that the jury believed the blood on the towel was Blundon's. The stipulation informed the jury that the results were inconclusive. We conclude that the trial court's finding that the sought-after discovery would not have changed the result, and therefore lacked materiality, is not clearly erroneous.

¶7 Key wants to test blood on Blundon's shirt to demonstrate that Blundon had ergotamine or other drugs in his system. Key believes the evidence would explain Blundon's confrontational behavior and support his claim of self-defense.[2] He also suggests that this evidence will portray a different picture of Blundon than that advanced by the prosecution. He explains that Blundon would

[1] Key's argument rests on the assumption that the jury believed he deliberately possessed the towel because he knew he was going to kill Blundon and wanted the towel to clean up any inculpatory evidence. Key explains that the blood on the towel was menstrual blood and that the towel just happened to be in his car amongst dirty laundry. This fact, Key surmises, would establish that he returned to the bar with the sole purpose of retrieving a forgotten item and acted only in self-defense.

[2] Ergotamine is used to treat migraine and cluster headaches. Key found literature explaining that sometimes ergotamine is combined with barbiturates to treat premenstrual or menopausal symptoms. Key also read that the sudden withdrawal from a barbiturate addiction can cause hallucinations or seizures, and that the consumption of coffee or alcohol can exacerbate withdrawal symptoms. Thus, Key surmises that because of his consumption of ergotamine, Blundon was unusually nervous and acted out against Key in an unreasonably forceful fashion.

have obtained ergotamine by using prescription drugs issued to Blundon's sister. Key would like an opportunity to show a jury that Blundon was not the law-abiding citizen the prosecution suggested but that Blundon engaged in the illegal use of drugs. He believes the prosecution was dishonest to represent that Blundon only had alcohol in his blood.

¶8 The presence of ergotamine is not new to this case. The original crime lab results showed ergotamine in Blundon's urine. This information was available to Key at the time of trial. Moreover, the stipulation that only alcohol was found in Blundon's blood was not a misrepresentation. The ergotamine showed only in Blundon's urine.

¶9 Key has no factual basis for his suggestion that Blundon was overly aggressive because of barbiturate use or withdrawal. The mere presence of ergotamine does not establish barbiturate use or abuse.[3] Even if Key could establish that Blundon used his sister's prescription drug, it does not translate to a propensity to commit violence against another. Witnesses to the event did not describe Blundon as agitated or that he acted as the aggressor. The prosecution did not portray Blundon as a law-abiding citizen but confined itself to whether Blundon engaged in aggressive behavior. Key's desire to impeach the victim's character by illegal drug use is not relevant to an issue of consequence. Overall, Key's desire to conduct further tests is nothing more than a fishing expedition.

[3] This is especially true because Blundon's sister explained to the medical examiner that she had a prescription for ergotamine because she suffers from migraine headaches. Nothing suggests that the prescription drug available to Blundon would have contained the barbiturates which Key looks to as causing heightened aggressiveness.

¶10 To the extent Key argues that his defense attorney was deficient for stipulating to the admission of the lab results, we summarily reject that claim. There simply was no basis for objecting to the state crime lab's blood test results, particularly after a corrected report was issued on the results of tests on Blundon's blood. Stipulating to inconclusive results on the blood on the towel was reasonable strategy.

¶11 Finally, Key attacks the trial court's competency to rule on the motion for postconviction discovery because the ruling did not come, as required by WIS. STAT. RULE 809.30(2)(i) (1999-2000),[4] within sixty days of the filing of the motion. The applicability of RULE 809.30 is questionable since Key's appeal under that provision was done. Even if the trial court was obligated to decide the motion within sixty days, the failure to do so means that the motion is deemed denied. In any event, the appeal puts before this court the denial of the motion for postconviction discovery.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] All references to the Wisconsin Statutes are to the 1999-2000 version.