

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP779-CR

Cir. Ct. No. 1995CF955367

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROY JAMES JONES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Roy James Jones, *pro se*, appeals from circuit court orders denying two postconviction motions, which sought new DNA testing of certain evidence. The circuit court denied the first motion because Jones refused to turn over the results of private DNA testing that his attorney

commissioned before trial, meaning Jones failed to satisfy the statutory prerequisites to court-ordered DNA testing. The circuit court denied the second motion after Jones demanded concessions in exchange for his disclosure of the test results. We conclude the circuit court properly denied the motions, and we affirm.

¶2 In 1995, the State charged Jones with one count each of first-degree sexual assault of a child, sexual assault, and attempted sexual assault, and two counts each of kidnapping while armed and first-degree sexual assault of a child while armed; all counts bore the habitual criminality enhancer. Jones was linked to the crimes through DNA evidence. Prior to trial, Jones's attorney had some evidence tested by a private lab called Genelex. However, counsel refused to disclose the results of the tests, or even the scope of testing, to the State. A jury convicted Jones of all charges, and he is serving a sentence totaling 143 years.¹

¶3 In May 2007, Jones filed a postconviction motion under WIS. STAT. § 974.07(7) (2007-08),² seeking additional, court-ordered DNA testing of certain evidence at the State's expense. The circuit court denied the motion because Jones had not met the statutory prerequisites for new testing. Specifically, by failing to disclose what evidence trial counsel had tested and what procedures Genelex used, Jones had not shown that the evidence would be subjected to a test using a

¹ Jones directly appealed his convictions; among other things, he challenged the sufficiency of the evidence underlying the verdicts. We affirmed. *See State v. Jones*, No. 1998AP685-CR, unpublished slip op. (Ct. App. June 29, 1999). Jones appealed a second time after the circuit court denied his second WIS. STAT. § 974.06 motion; we affirmed. *See State v. Jones*, No. 2004AP1836, unpublished slip op. (WI App Dec. 20, 2005).

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

technique that was not available or utilized at the time of prior testing. *See* WIS. STAT. § 974.07(2)(c).

¶4 Jones appealed and we affirmed.³ *See State v. Jones*, No. 2007AP2097-CR, unpublished slip op. (WI App Sept. 23, 2008) (*Jones III*). We explained that “Jones did not elaborate on what other tests could have been performed, and equally important, why the court should now order additional testing when he declined to introduce the results of the tests performed at his behest prior to trial.” *Id.*, ¶12.

¶5 In December 2009, Jones filed another postconviction motion. He argued that under WIS. STAT. § 974.07(6)(a)2., the State was required to make ten evidentiary items available to Jones for testing, this time at his own expense. The court denied the motion, explaining that based on the opinion in *Jones III*,

further DNA testing pursuant to sec. 974.07, Wis. Stats., will not be considered unless and until the defendant turns over to the court and the State the private DNA testing that his attorney had performed by Genelex. It is entirely unknown what was submitted and what was done by this lab. The State is entitled to know what was done previously before it turns over any evidence to another lab ... and the court is entitled to know what was done before it considers any further request for DNA testing under sec. 974.07, Stats.

¶6 In January 2010, a week after the circuit court denied the prior WIS. STAT. § 974.07 motion, Jones filed an additional motion. In this motion, Jones “agreed” to turn over the Genelex results, provided the State and court “allow the following conditions be met and satisfied[.]” The conditions Jones demanded

³ Jones’s motion, the circuit court’s order, and our opinion addressed more than just the request for new DNA testing; the other issues are not relevant to the instant appeal.

included having the State dismiss the claims relating to one of Jones's two victims, and having the State pay for DNA testing. The court denied the motion, stating in part:

The defendant now wishes to play Let's Make a Deal before he turns over those results and has demanded that certain conditions be met by both the court and the State before he does so. This court does not play such games and declines to submit to the defendant's demands. Under the circumstances, the defendant's third motion for postconviction DNA testing is denied.

¶7 Despite other complaints in Jones's brief, like sufficiency of the evidence, the only issue properly before this court on appeal is whether the circuit court has properly denied Jones's postconviction motions for additional DNA testing because of his failure to turn over the Genelex results. We conclude that until Jones discloses the Genelex results, he will remain unable to fulfill the necessary statutory criteria for additional court-ordered testing.

¶8 WISCONSIN STAT. § 974.07(6) "gives a movant the right to conduct DNA testing of physical evidence that is in ... possession of a government agency and that contains biological material or on which there is biological material, *if* the movant meets several statutory prerequisites." *State v. Moran*, 2005 WI 115, ¶3, 284 Wis. 2d 24, 700 N.W.2d 884. First, the movant must show the evidence fulfills the conditions within § 974.07(2). *Moran*, 284 Wis. 2d 24, ¶3. Second, the movant must comply with reasonable conditions imposed by the court for preservation of the evidence's integrity. *Id.*; *see also* § 974.07(6)(c). Finally, testing must be at the movant's expense. *Moran*, 284 Wis. 2d 24, ¶3. If the movant seeks to have the public pay for new DNA testing, the movant must proceed under § 974.07(7). *Moran*, 284 Wis. 2d 24, ¶3. Section 974.07 also

requires a movant to show the evidence meets the conditions specified in § 974.07(2). *See* § 974.07(7)(a)3. & (b)2.

¶9 While WIS. STAT. § 974.07(2) has three requirements, it is only necessary in this appeal to focus on § 974.07(2)(c), which requires a movant to show that the evidence:

has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

¶10 Jones does not dispute that some evidence in this case was tested both by the State and by Genelex on his behalf. While we know what evidence the State tested as well as the methods used, we do not know what Genelex tested or the testing methods it used. Unless the scope and results of the prior Genelex testing are disclosed, Jones cannot show the evidence he seeks to have tested “has not been previously subjected to forensic ... testing[.]” Without disclosing the scope of the tests, Jones cannot show there is “a scientific technique that was not available or was not utilized” in previous testing. Without disclosing the results of the tests, Jones cannot show that any alternate test provides “a reasonable likelihood of more accurate and probative results.” Thus the December motion, brought under WIS. STAT. § 974.07(6) was properly denied, for the same reasons explained by *Jones III* in denying the § 974.07(7) motion.

¶11 The court likewise properly denied Jones’s January motion. While Jones complains it is unfair for the court to set conditions for the disclosure of the Genelex testing, the court is doing nothing more than applying the statutes

governing Jones's ability to seek new DNA testing. Those statutes do not permit Jones to set conditions for his compliance.

By the Court.—Orders affirmed.

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

