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DISTRICT IV

January 16, 2013

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2011AP1981-CR State of Wisconsin v. Albert L. Howard (L.C. # 2005CF930)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Albert Howard, pro se, appeals an order denying Howard's motion for postconviction DNA testing under WIS. STAT. § 974.07 (2009-10).[1] Howard contends that he is entitled to retesting of the biological evidence used against him at trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Howard was convicted of first-degree sexual assault of a child. We affirmed the conviction on a no-merit appeal. Howard filed a postconviction motion for DNA testing of biological specimens the State had used at trial to establish that both he and the minor victim tested positive for gonorrhea and chlamydia. *See* WIS. STAT. § 974.07. Howard argued that he was entitled to testing of the biological specimens collected from the victim and Howard, to challenge whether each was accurately diagnosed. The circuit court held a hearing and denied the motion.

Howard contends that he is entitled to retesting of the biological specimen the State asserted was collected from Howard to challenge whether the specimen was Howard's specimen and whether the specimen was positive for gonorrhea and chlamydia. He also asserts that he is entitled to retesting of the specimen collected from the victim to challenge whether the specimen was positive for gonorrhea and chlamydia. We disagree.

Under WIS. STAT. § 974.07(7)(a), a defendant is entitled to DNA testing of evidence if: (1) the defendant maintains his or her innocence; (2) "[i]t is reasonably probable that the [defendant] would not have been prosecuted [or] convicted … if exculpatory [DNA] testing results had been available before the prosecution [or] conviction"; and (3) "[t]he chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or … the testing itself can establish the integrity of the evidence." Additionally, the evidence the defendant seeks to have tested must be: (1) relevant to the conviction; (2) in the actual or constructive possession of the government; and (3) not previously subjected to DNA testing or, if it was previously tested, able to be tested by a newly available scientific technique that is reasonably likely to provide more accurate results. WIS. STAT.

§§ 974.07(2) and (7)(a)3. Here, several of the required criteria for postconviction DNA testing are not met.

First, as posited by the State, Howard has not shown that it is reasonably probable that he would not have been prosecuted or convicted if the testing had not established that the victim and Howard were positive for gonorrhea and chlamydia. The victim reported that Howard had genital to genital sexual contact with her, which was presented to the jury through a videotaped interview of the victim and the victim's in-court testimony. In light of that evidence, we conclude that it is not reasonably probable that, absent the biological evidence, Howard would not have been prosecuted or convicted.

Additionally, the evidence was previously tested, and Howard does not assert the availability of newly developed scientific techniques that are likely to provide more accurate results. It also appears from the record before us that the evidence is not in the possession of the government.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals