STATE OF WISCONSIN CIRCUIT COURT MARQUETTE COUNTY

State of Wisconsin, Plaintiff

Vs.

Joseph A Awe, Defendant.

Case No. 07 CF 54

DECISION AND ORDER

The defendant moves for a new trial, after a jury trial conviction for arson. He alleges three grounds: 1) that there is newly discovered evidence which to a reasonable probability would have caused a jury to have reasonable doubt as to his guilt; 2) that his trial attorney was deficient in performance; and to boot: 3) the appellate attorney was deficient for not understanding why the trial attorney was deficient.

The crux of the argument is the reliance by the state's expert witnesses on a "negative corpus" form of analysis of the origin of the fire. The new evidence offered amounts to what is a maturing development in the arson investigation field, one which would bury the "negative corpus" approach. In this case it came into evidence in particular from the newest National Fire Protection Association "921 Guide for Fire and Explosion Investigations, 18.6.5" (2011), which the defendant's expert at the post trial hearing, John Lentini, testified sets the standards for most fire investigations.

The standard stated in this guide now advises that it is improper to give an opinion as to a specific ignition source that has no evidence to support it, simply by eliminating all other hypothesized sources. Prior to 2011, the scientific objections to the

elimination methodology were not so strongly stated, and in limited circumstances, it was still "allowed." By 2011, the "negative corpus" advocates had lost the argument for its use.

This is the essence of the "new evidence" here. The new standard would have been used to impeach the State's expert witness who, since he uses this method, would be using, now, an unapproved method. The point is, an expert should not properly come to an opinion to a reasonable degree of certainty, according to this new guide, if he relies only on the "negative corpus" methodology.

What Mr. Lentini and the NFPA are telling us is that the arson investigators in this case gave opinions to a degree of certainty not merited by the evidence. It's not that this was neglected as an issue at trial. What's new is that the defendant's case has been very much enhanced by the maturing standard which now recognizes that the "negative corpus" methodology leads to wrong results.

Our Appeals Court considered a very similar situation in a shaken baby case, State v. Edmunds 308 Wis. 2d 374. In shaken baby cases, medical evidence had over time developed a theory that certain symptoms of injury definitively pointed to violent shaking. However, more recent medical studies had cast doubt on this certainty, suggesting possible alternate causation.

Even though the defendant in Edmunds had raised the issue previously in a post conviction motion, as the defendant did here, the appeals court found that it now had new evidence of a different nature, and would look at it again. It was new evidence, discovered after conviction, the defendant was not, (could not) have been negligent in seeking it, it was material and it was not merely cumulative. Because the new evidence

indicated that a shift in "mainstream medical opinion" provided competing medical opinions on causes of the observed symptoms, a new jury would probably find reasonable doubt as to the defendant's guilt the court held.

In the sense that mainstream expert opinion has shifted, the present case is quite similar to Edmunds, Mr. Lentini's evidence is credible enough to blow a huge hole in the State's case.

Here the State's other evidence as to a set fire origin, to say the least, was weak; so this is not harmless. There was no direct evidence of the defendant's guilt. Circumstantial evidence of motive (financial hardship), and removal of keepsakes prior to the fire (just as likely consumed by the fire) added little. There was much argument over evidence regarding whether the electrical breaker box was involved and the location of the origin, and those arguments are not resolved by the new evidence. But the case was utterly dependent on the expert's opinion that this was a "set fire". Had the jury learned that the State's experts had used a methodology now disapproved by a mainstream arson investigation association, there is a reasonable probability it would have had reasonable doubt as to the defendant's guilt. The result would have probably been different.

No one of the State's experts could determine a cause of the fire; they had theories as to potentialities, but no cause. From that they concluded, by elimination of hypothetical accidental causes, that the fire was not accidental. Without that opinion, there could hardly have been proof beyond a reasonable doubt. If it could have been accidental, it would have taken some strong evidence to point the finger at the defendant, and there was no such evidence.

This is not the fault of the State's arson investigators, who were trained in the flawed methodology. It is the result of the maturation of the arson investigation field, a gradual process of taking a second look at the negative corpus thinking.

Since this holding is dispositive on the motion, the other grounds argued will not be addressed by the Court.

The motion for new trial is granted. The defendant should submit the appropriate order vacating the judgment and releasing the defendant.

Dated at Montello, Wisconsin this 21 day of March, 2013.

Hon. Richard O. Wright
Circuit Court Judge