



Evan Zimmerman

In November 1998 Evan Zimmerman began dating Kathleen Thompson in Eau Claire, Wisconsin, but they broke up in May 1999.

Not quite a year later, on February 25, 2000, Thompson married Robert Miles, though the marriage got off to a shaky start—they were seen fighting at the wedding reception. That night, both Miles and Thompson were taken to jail following a domestic dispute.

At 3 a.m. on February 26, Thompson was released while her husband was remained in custody on a probation hold. Thompson refused an offer of a ride home from a police officer and set out on foot to her residence, just a few blocks away.

At 5:45 a.m., her body was found on a curb on Laurel Street. She had been strangled.

Police found Zimmerman on the afternoon of the morning the body was found. He was drinking in a VFW bar and was very intoxicated.

A prosecution witness testified that Zimmerman told him that Thompson had been murdered and “they found her up on Margaret Street, gutted like a fish.”

Police contended that even though some of the details were wrong (the street was Laurel and she had not been gutted), he knew these things because he was the killer. Zimmerman contended he had heard that information when he got up that morning and went to a gas station to buy cigarettes.

Zimmerman contended he had been at the VFW on the night of the murder—which was confirmed by witnesses—and then went to try to stay at the home of a friend, Diane Steinke, but went home instead when she did not answer his knock.

Steinke told police that Zimmerman had spent the night at her home—a conflict that aroused police suspicion.

In April 2000, while the case was still under investigation, police conducted a traffic survey near where Thompson’s body was found, asking motorists if they had been in the area on the morning the body was found.

One motorist, Brice Rene said he had been there and noticed a white van with a sleeping or passed out female passenger around 5:30 a.m. while going to work. Rene said Zimmerman’s van, a white Dodge with wood paneling, looked like the van he saw, but he was not sure.

Police had Rene hypnotized. During the session, Rene said the woman had a medium build, was in her late thirties and had shoulder-length brunette hair—qualities that fit Thompson.

Zimmerman was interviewed on several occasions—some of these interviews

State: Wisconsin

County: Dodge

Most Serious Crime: Murder

Additional Convictions:

Reported Crime Date: 2000

Convicted: 2001

Exonerated: 2005

Sentence: Life

Race: Caucasian

Sex: Male

Age: 53

Contributing Factors: False Confession, Inadequate Legal Defense

Did DNA evidence contribute to the exoneration? Yes*

occurring when he was drunk, he later claimed. In August 2000, police told him a witness had seen a woman with her eyes closed in a white van near the area where Thompson was found. An officer would later testify that Zimmerman replied "Nobody saw us," although on cross-examination, he conceded that Zimmerman actually said, "nobody saw us because we weren't together."

The state found witnesses who said that after Zimmerman and Thompson broke up, Zimmerman continued to be obsessed with her, appearing at taverns and other places where she was, even showing up in her kitchen once in the middle of the night.

One witness said he heard Zimmerman say that he wanted to kill Thompson, cut out her genitals and take them home to have sex whenever he felt like it.

On February 5, 2001, Zimmerman, 53, was charged with her murder. He went on trial in Dodge County Circuit Court in May 2001.

The prosecution's case was largely circumstantial and focused on alleged incriminating and conflicting statements Zimmerman made during the lengthy investigation of the murder.

The prosecution contended that Zimmerman finally snapped in anger over Thompson's marriage and killed her.

A medical examiner said Thompson died of ligature strangulation and that a telephone cord found in Zimmerman's van may have been used. He also testified that Thompson's nasal secretions had dried in a way to suggest she had been sitting up, rather than lying down, which was consistent with her sitting in the passenger seat of Zimmerman's van.

The prosecution presented a hair identified as Thompson's found on a brush in Zimmerman's van.

The defense presented evidence that Zimmerman was "over" his relationship with Thompson. A man whom Thompson dated between Zimmerman and her husband, Robert Miles, said that Zimmerman was not angry when he learned of the relationship and told him to treat Thompson well. Two other witnesses testified that Zimmerman wished Thompson well when he learned she was getting married.

Zimmerman was convicted on May 17, 2001. He was sentenced to life in prison.

On August 12, 2003, the Wisconsin Court of Appeals reversed the conviction, finding that Zimmerman's trial lawyer was inadequate.

The court found that the lawyer had failed to introduce the results of DNA testing of evidence found and near Thompson, including hair and cigarette butts. The tests of some items excluded Zimmerman and the tests of others excluded not only Zimmerman, but also Thompson and Robert Miles, her new husband.

Further, the lawyer had failed to present evidence that even though police recovered a substantial amount of dog hair from the van (Zimmerman owned a dog), no dog hair was found on Thompson. In addition, the jury never learned that Thompson's sweater was covered with hair from her cat, but no cat hair was found in Zimmerman's van.

The lawyer failed to inform the jury that DNA tests on the telephone cord were negative for the presence of DNA and that carpet fibers found on Thompson's shoes could not be matched to any source.

The court also noted that after the conviction, another medical expert determined that the telephone cord could not have been the murder weapon because the mark left on Thompson's neck was a wide, webbed, fabric-like

pattern and contained a buckle mark.

On June 30, 2004, Zimmerman was released on bond pending a retrial.

He went on trial in April 2005, but on April 29, after five days of testimony, Eau Clair County District Attorney Rich White asked that the case be dismissed because he did not have sufficient evidence to secure a conviction.

Zimmerman, who had suffered a stroke while in prison, died of cancer on July 1, 2007. A civil wrongful conviction lawsuit brought against Eau Claire County was dismissed at the request of his family.

– *Maurice Possley*

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Seventh Circuit Hears Oral Argument In Evan Zimmerman Case

Posted on April 11, 2007 by [Andy Hale](#)

On April 10, 2007, the Seventh Circuit Court of Appeals heard oral argument in the case of Evan Zimmerman versus the City of Eau Claire, et al. Last year, District Judge John C. Shabaz granted summary judgment to the defendants, the City of Eau Claire, and police officers Eric Larsen, Donn Adams, Gary Foster and Todd Trapp in Zimmerman's civil rights lawsuit. In 2001, Zimmerman was charged with the murder of Kathy Thompson, a woman who was recently married and whom Zimmerman had previously dated. Thompson had been strangled. At his criminal trial, Zimmerman was convicted of murder. Zimmerman was granted a new trial due to his trial counsel's deficiencies. After a second criminal trial was commenced in April 2005, the district attorney decided to drop its prosecution of Zimmerman. Zimmerman subsequently filed a civil rights lawsuit claiming the defendants denied him due process of law by withholding exculpatory evidence. Zimmerman claimed that the defendants withheld exculpatory evidence concerning the testimony of Maureen Horne. The district court rejected this argument, stating "This argument is highly speculative. . . There is no evidence in the record that an earlier statement by Horne existed and was destroyed or that she was improperly coached by defendant Larsen. Plaintiff has failed to show that there was any statement by Horne that was exculpatory which was destroyed or suppressed by the defendants." Zimmerman also claimed that the police officers coerced testimony from witness Brice Rene. The district court rejected that argument too, stating "there is no evidence that any of Rene's statements were coerced or improperly coached. Plaintiff's attorney had the opportunity to cross examine Rene concerning his statements and the hypnosis. Rene's statements did not deny plaintiff due process." The district court also rejected Zimmerman's claim that defendant Trapp falsified plaintiff's polygraph report. Thus, the district court granted summary judgment to the defendants. At the oral argument before the Seventh Circuit, Zimmerman's attorney, Jon Loevy of Loevy & Loevy, argued that summary judgment should not have been granted and that Zimmerman was entitled to a trial. Counsel for the police officers argued that Zimmerman's arguments were based on mere speculation and there was no evidence of police misconduct. Judge Richard Posner chaired the Seventh Circuit panel that heard oral argument. A decision is expected later this year.

<http://truthinjustice.org/evan-zimmerman.htm>

April 30, 2005

Man freed; murder charge is dropped

by Dee J. Hall

JUNEAU - Declaring that his prayers had been answered, an emotional Evan Zimmerman left the Dodge County Courthouse Friday a free man after the murder case against him was dropped.

Eau Claire County District Attorney Rich White asked a judge Friday to throw out the case mid-trial, saying he lacked the



Evan Zimmerman, center, hugs his attorneys, Keith Belzer (left) and Keith Findley (right) after prosecutor dropped charges.

evidence to show "beyond a reasonable doubt" that Zimmerman had killed his former girlfriend.

White told Eau Claire County Circuit Judge Benjamin Proctor he understood the impact of halting the trial at this stage, including a ban on charging Zimmerman again in the crime.

It was the second trial for Monona native Zimmerman, whose conviction in the murder of Kathleen Thompson, 38, of Eau Claire, was overturned in 2003 after the state's 3rd District Court of Appeals ruled he didn't get a fair trial.

After the short hearing was adjourned, Zimmerman, 58, grabbed his attorneys, Keith Belzer of La Crosse and Keith Findley, a UW-Madison law professor, in a tear-filled embrace. He later held up a white T-shirt declaring "Freed by the Wisconsin Innocence Project."

Zimmerman of La Crosse spent 3 years in prison before he was released on bond last year. Zimmerman is the fourth inmate freed through the efforts of Findley's group, the Wisconsin Innocence Project, which operates out of the UW-Madison Law School.

Watching the trial were Zimmerman's three children, their spouses, a handful of supporters and about half a dozen UW-Madison law students who'd worked on his case. The trial, which began Monday, had been scheduled to last two weeks. It had been moved 200 miles from Eau Claire to Juneau to avoid pretrial publicity.

Asked what he planned to do next, the former Augusta police officer joked, "I'm just gonna take a long nap and do my laundry. It's been a long time."

Speaking after the hearing, Belzer said the defense team never wavered in its belief that Zimmerman had been wrongfully convicted. Findley added that Friday's move to dismiss the charge even before White had put on his entire case "fortified that belief."

White's prosecution was based primarily on Zimmerman's past romantic relationship with Thompson and the belief by Eau Claire police that he'd been inconsistent in his statements about where he was on Feb. 26, 2000, when Thompson was strangled and left on an Eau Claire street.

Thompson was last seen at 3 a.m. walking from the Eau Claire County Jail, where she had been taken along with her husband after the two had a violent fight just hours after their wedding. The husband was in jail at the time of the murder and never considered a suspect.

Zimmerman's son, Shannon, said his father's jumbled statements stemmed from the fact that he was in an alcoholic haze at the time of the crime and during subsequent police interviews. He said the case against his father consisted of "out-of-context statements, misleading statements and very, very shaky facts."

Last summer, White's case was bolstered when police found a single hair from a dog that could have come from Zimmerman's dog, Boots, in a bag of evidence taken from Thompson's bra. But Findley strongly challenged that evidence, forcing White's expert witness to acknowledge the hair could've come from a number of dogs.

The defense also challenged the police theory that Zimmerman killed Thompson in his minivan, noting that not a single dog hair was found on her black sweater or jeans although the interior of the vehicle was covered in hair from Boots.

In asking for the dismissal, White said his ability to prove his case had become "untenable," adding that he had an "ethical obligation at this juncture to dismiss this charge."

Belzer said White's motion "is the closest you can get to an exoneration." He said Zimmerman's second trial "resembled everything that's good and true about American justice . . . because ultimately an innocent man was given a second chance."

However, Findley added that the cost to Zimmerman was high.

"I don't think we should lose sight of the fact that Evan lost an awful lot in the process," Findley said. "He was in prison for 3 years. He suffered a stroke in prison. He lost everything he had. So he's got to rebuild now."

Findley said he believes the Eau Claire police developed "tunnel vision" about the case and refused to change direction even after DNA and other physical evidence pointed away from Zimmerman and their theory of how Thompson was murdered.

Eau Claire Police Chief Jerry Matysik defended his department's investigation and noted that the first jury convicted Zimmerman. He attributed Friday's dismissal to a successful defense strategy to "inject doubt" into the case and the difficulty in proving a case so long after the crime.

"Obviously, we felt we focused on the right person," Matysik said.

However, Belzer said, "I don't think the evidence showed anything except that there's no way that he (Zimmerman) did this."

<http://truthinjusticefiles.blogspot.com/2007/07/in-memory-of-evan-zimmerman.html>

In memory of Evan Zimmerman

by [Mike "Pie" Piaskowski](#) - Green Bay, WI

Yesterday I received the sad news that a fellow Wisconsin exoneree and good friend of mine by the name of [Evan Zimmerman](#) passed away of cancer. He was only 61.

Evan was incarcerated for more than three years after being convicted of first-degree intentional homicide in the strangulation death of his ex-lady friend in 2001. Kathy Thompson, 38, had been found dead in February 2000 in Eau Claire, WI. Ev, a former police officer himself, was arrested about a year later and was eventually convicted of the unsolved murder.

With the help of the Wisconsin Innocence Project, Ev successfully appealed on the grounds of ineffective assistance of counsel and won the right to a retrial. In 2005 the judge ruled that certain unreliable testimony could not be used at the new trial. Without the tainted evidence and nothing else to rely on the DA dropped all charges. Ev steadfastly denied any involvement in her death - maintaining his innocence from the very beginning.

After his release from prison Ev was forced to move from Eau Claire to LaCrosse, WI after bringing a wrongful-conviction lawsuit against the Eau Claire police department. Sadly, in 2006 the federal court dismissed the suit.

In 2005 the A&E channel put together a documentary about Evan's case by the name of "Facing Life - The Retrial of Evan Zimmerman". It was aired in April 2006.

Ev was a wonderful person and will be missed by many. Let us pray that we can all work together, in Evan's name, as well as all of the exonerees throughout the country, to help eliminate these and all other forms of injustice created by our justice system.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EVAN ZIMMERMAN,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-85-S

CITY OF EAU CLAIRE, ERIC LARSEN,
DONN ADAMS, GARY FOSTER and
TODD TRAPP,

Defendants.

Plaintiff Evan Zimmerman commenced this civil action against defendants City of Eau Claire, Eric Larsen, Donn Adams, Gary Foster and Todd Trapp pursuing constitutional and state law claims arising from his arrest and conviction for murder. Plaintiff claims that the defendants denied him due process, falsely imprisoned him, conspired to violate his constitutional rights and failed to intervene to prevent constitutional violations. Plaintiff pursues state law claims of malicious prosecution, civil conspiracy, intentional infliction of emotional distress, false arrest/false imprisonment, respondeat superior and indemnification.

On August 1, 2006 defendants City of Eau Claire, Eric Larsen, Donn Adams and Gary Foster moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

Defendant Todd Trapp moved for summary judgment on September 1, 2006. Although plaintiff has not had the opportunity to respond to the motion, the Court will decide it since it is based on the same facts and law as the motion for summary judgment filed by defendants City of Eau Claire, Larsen, Foster and Adams to which the plaintiff has responded. Defendants City of Eau Claire, Larsen, Foster and Adams have also moved to strike plaintiff's expert and dismiss his claim for medical damages.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is

not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motions for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Evan Zimmerman is an adult resident of LaCrosse, Wisconsin. Defendant City of Eau Claire is a municipal entity and local government as defined by Wisconsin law. Defendant Eric Larsen has been a police officer for the City of Eau Claire for twenty three years and is presently the Deputy Chief of the Detective Division of the Department. Defendant Donn Adams is a Detective with the Eau Claire Police Department and has been employed by the Department for 26 years. Defendant Gary Foster worked for the Department for 33 years before his retirement and was the Deputy Chief of the Detective Division. Defendant Todd Trapp was a police officer with the Eau Claire police department from 1984 through May 16, 2006.

On February 25, 2000 Kathy Thompson and Robert Miles were married. At about 1:50 a.m. on February 26, 2000 Thompson and Miles had a physical altercation at their apartment with Thompson hitting Miles with a phone or hanger causing him to bleed onto her. The police were called and Thompson was arrested for the domestic

incident. Miles was taken to jail on an unrelated Probation hold and remained in jail.

Thompson signed a Waiver of Rights at the police station at 2:40.a.m. and signed her prepared statement at 2:44 a.m. on February 26, 2000. Thompson was then released from jail around 3:00 a.m. and began walking toward her home. At that time she had some of Miles' blood matted in the front portion of her hair.

At 5:45 a.m. on February 26, 2000 her body was found strangled to death on Laurel Avenue, approximately one half block from the intersection of Margaret Street. Eau Claire Police Officers Pionkowski and Staniszewski responded to the scene. Thompson's death was thought to have been murder by asphyxia due to ligature strangulation. When her body was found Thompson did not have blood in her hair and it appeared her hair had been brushed.

Sgt. Venaas, who had responded to the earlier call at Thompson's residence, went to the residence to see if there was any sign that she had returned home after being released from jail. He reported that there were no signs that she had returned home.

After the body was discovered, plaintiff Evan Zimmerman immediately became the focus of the murder investigation. He had dated Thompson from sometime in 1998 until May of 1999. He resided about one and one-half blocks from Thompson and remained friendly with her. There were reports that plaintiff was obsessed with Thompson.

On February 26, 2000 at 1:45 p.m. Eau Claire Police Officers Southworth and Slaggie located Zimmerman at the VFW bar and informed him of Thompson's death. They did not provide details of the investigation.

Initially the police investigating the crime knew only that Thompson had been killed by ligature strangulation. They did not know what had been used as the ligature.

A search of Zimmerman's vehicle on February 27, 2000 revealed a hairbrush above the front passenger visor. DNA tests on two strands of hair found in the hairbrush confirmed that the hair was Thompson's.

A telephone cord was found in plaintiff's van. Dr. McGee, the medical examiner who performed the autopsy, stated it was possible that the telephone cord could have been the ligature used in the murder.

On or about March 3, 2000 defendant Trapp conducted a polygraph of Zimmerman. Based upon Trapp's scoring of Zimmerman's polygraph chart, Trapp interpreted the polygraph as "deception indicated."

On March 3, March 6 and April 4, 2000 defendant Adams interviewed Jim Stefanic, a friend plaintiff had mentioned in his statements. Defendants Larsen and Foster interviewed Stefanic on April 4, 2000 concerning any knowledge he had concerning the Thompson murder. Stefanic reported being in Thompson's house some

day before the murder. He chose not to take a polygraph examination. Stefanic's alibi was not documented by the police officers.

On March 15, 2000 the Eau Claire Police Department organized a traffic canvas in the neighborhood where Thompson's body had been found at the same time they believed the crime had occurred. Officer Piontowski stopped several individuals including Brice Rene. Rene specifically recalled driving through that area on the morning of February 26, 2000. He reported that at 5:30 a.m. that day he had seen a white van drive up the hill and turn onto Lee Street. Rene mentioned that he had seen a female passenger in the van who appeared to be either asleep or passed out. Officers then showed him a picture of Zimmerman's van, a white 1990 Dodge Caravan van. Rene was not certain that it was the van he saw.

A few days later Rene met with Detective Adams. Rene could not recall seeing the driver of the van but stated again that he had seen a female passenger either asleep or passed out. He believed that the female passenger was in her late thirties.

On or about May 15, 2000 Eau Claire police officers transported Rene to Madison, Wisconsin to undergo hypnosis to see if he could remember any additional details about the morning of February 26, 2000. Rene's recollections under hypnosis did not vary much from his previous statements. Rene stated in his

affidavit that he was not coerced or pressured into making statements concerning his observation of the white van.

In June 2000 Officer Larsen met with Maureen Horne, plaintiff's neighbor. Horne advised Larsen that at 3:00 p.m. February 26, 2000 Zimmerman appeared at her home near crying and with his hands shaking. He informed her that Kathy had died, that her body had been found on Margaret Street, that she had been strangled and that she had been disemboweled. Larsen asked Horne if she was sure about the information and she said she was. Horne prepared a written statement on June 13, 2000 recounting her February 26, 2000 conversation with plaintiff.

Horne stated in her affidavit that she had not been coerced or unduly pressured to make this statement. She also testified that she did not recall whether she had previously reported to police officers that plaintiff had told her the afternoon of February 26, 2000 that Thompson had been strangled.

On February 2, 2001 defendant Larsen swore out a criminal complaint charging Zimmerman with murder. The same date Circuit Court Judge Lenz found that probable cause existed that the crime of First Degree Intentional Homicide was committed by the defendant and issued a warrant for his arrest. The complaint included evidence showing plaintiff's obsession with Thompson, his inconsistent statements, his knowledge of the manner of death and location of the body prior to it being made public and testimony

that a van similar to his had been seen in the area with a female passenger who was either asleep or passed out.

Zimmerman was arrested for murder and was questioned as to his numerous recollections as to his whereabouts the morning of February 26, 2000. At that point he said he could not remember but that he was going to continue to say that he had gone home and gone to bed. He also said it was possible he had blacked out.

On February 12, 2001 plaintiff had a preliminary hearing before Judge Eric Wahl. Maureen Horne testified that on the afternoon of February 26, 2000 plaintiff had told her that Thompson had been strangled. Brice Rene testified that at about 5:30 a.m. on the morning of February 26, 2000 he saw a white van with a woman passenger who looked like she was sleeping or passed out in the neighborhood where Thompson's body was found. After testimony of 15 witnesses, Judge Wahl found sufficient evidence to bind plaintiff over for trial. The Court explained as follows:

There was a relationship, there was some testimony although admittedly it was some time prior but some evidence of some physical abuse. It was in September of '98. Some threats. There was obviously upset over a wedding and events. Probably the most important evidence at this point is the fact that he, Mr. Zimmerman, apparently knew circumstances about Miss, about the death of Miss Thompson and her body location, so forth, that wasn't public at the time or weren't public at the time he was having the conversation about the fact that the body was found up by Margaret Street, the fact that there had been a strangulation so I do find

that there is probable cause to bind Mr. Zimmerman over and do bind him over.

On May 8, 2001 Kenneth B. Olson, a Forensic Scientist/Trace Evidence Examiner with the State of Wisconsin Crime Lab, submitted a report which was forwarded to the City of Eau Claire Police Department on or about May 15, 2001. This report indicated that the tape lifts of the injured area of Kathleen Thompson's neck contained very short fiber fragments of blue and black cotton. Shortly thereafter the report was provided to the District Attorney who provided it the same day to plaintiff's defense counsel.

At plaintiff's trial on May 15, 2001 Maureen Horne testified that plaintiff had told her on the afternoon of February 26, 2000 that Thompson had been strangled. On May 16, 2001 Brice Rene testified that the morning of February 26, 2000 at around 5:30 a.m. he had seen a white van with a female passenger who was either asleep or passed out in the vicinity where Thompson's body was found.

At the May 2001 trial defendant Larsen testified that he had located cigarette butts in the vicinity of Thompson's body. He testified that testing was done but that no evidence was generated that provided insight into the crime. Larsen also testified that all of the prison inmates with whom Thompson had corresponded had been incarcerated the time of her murder. One inmate was not officially incarcerated but was basically under house arrest which meant he was prohibited from leaving the facility during the time

that the murder had occurred. The jury convicted plaintiff of murder.

At the sentencing hearing Judge Wahl stated as follows:

So although I firmly believe Mr. Zimmerman is guilty as charged I'm persuaded that the combination of his destructive relationship with Ms. Thompson fueled by substantial amounts of alcohol that were consumed before, after and during this period caused these tragic events to occur.

On appeal the Wisconsin Court of Appeals found in its August 12, 2003 decision that the evidence introduced at the trial was sufficient to sustain the jury's guilty verdict. The Court of Appeals also found that plaintiff's trial counsel was ineffective "due to his failure to present DNA evidence that excluded Zimmerman, offer alternative medical testimony and challenge Rene's hypnotically refreshed testimony." The Court found plaintiff was entitled to a new trial because the cumulative effect of trial counsel's deficiencies prejudiced plaintiff's defense.

Before the second trial in December 2004 animal hairs on Kathy Thompson's sports bra which was evidence in the case were tested. These animal hairs were found to be consistent with hair from Evan Zimmerman's dog. Although not analyzed for the previous trial, the hairs had been noted by Kenneth Olson at the Crime Lab in 2000.

After the second criminal trial was commenced in April 2005, a decision was made by the District Attorney to not continue the

prosecution of the matter. Since jeopardy had attached plaintiff can no longer be prosecuted for Thompson's murder.

The City of Eau Claire Police Department's rules prohibit police officers from failing to report to the Department any information concerning any crime or other unlawful actions or for making a false report. The rules of conduct also directed that officers communicate accurate and factual accounts of witness statements.

Plaintiff never filed a Notice of Injury or written claim under Wis. Stats. § 893.80(1)(a).

MEMORANDUM

Plaintiff claims that he was denied due process when the defendants withheld exculpatory evidence from him. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A failure by the police to disclose exculpatory evidence would violate due process. Newsome v. McCabe, 256 F.3d 747, 752(7th Cir. 2001)

Plaintiff argues that the defendants withheld exculpatory evidence concerning the testimony of Maureen Horne. Horne testified at both the preliminary hearing and at plaintiff's trial that plaintiff had told her on the morning of February 26, 2000

that Thompson had been strangled. She also signed a statement to this effect on June 13, 2000.

Plaintiff argues that there is no report prior to June 13, 2000 indicating that Horne advised police that plaintiff had told her on February 26, 2000 that Thompson had been strangled. Accordingly, he concludes that Larsen coerced her into making this statement in June 2000 and that her earlier written statements to police which did not include this information were destroyed.

This argument is highly speculative. Plaintiff has submitted no testimony by the witness Maureen Horne which supports his argument that she made an earlier written statement or that her statement was coerced. In fact, Horne testified that she was not coerced to make the statement. Further, her sworn testimony both at the preliminary hearing and trial was consistent with her statement that plaintiff told her on February 26, 2000 that Thompson was strangled. There is no evidence in the record that an earlier statement by Horne existed and was destroyed or that she was improperly coached by defendant Larsen. Plaintiff has failed to show that there was any statement by Horne that was exculpatory which was destroyed or suppressed by the defendants.

Plaintiff also argues he was denied due process because Rene's testimony was coerced and that this fact was withheld from plaintiff. Id., at 749-753. It is undisputed that on March 15, 2000 Brice Rene volunteered information that on February 26, 2000

he had seen a white van in the vicinity where the victim was found. He saw a female passenger in the van who appeared to be either asleep or passed out. Rene was hypnotized but his recollections did not vary much from his previous statements. This information which may or may not have been exculpatory was all provided to plaintiff's counsel. There is no evidence that any of Rene's statements were coerced or improperly coached. Plaintiff's attorney had the opportunity to cross examine Rene concerning his statements and the hypnosis. Rene's statements did not deny plaintiff due process.

Plaintiff argues that defendants' failure to document Stefanic's alibi for the time of the murder and to canvas the victim's neighborhood denied plaintiff due process. Plaintiff has not shown that had defendants taken these actions they would have discovered exculpatory evidence. These actions did not deny plaintiff due process because he had not shown that exculpatory evidence was withheld from him.

Plaintiff argues that the prosecution's theory that Thompson was strangled by a telephone cord denied plaintiff due process because defendants Larsen and Trapp failed to disclose evidence that black and blue cotton fibers were found in Thompson's neck wound. This evidence was not consistent with the suspicion that the telephone cord found in plaintiff's van was the murder weapon. This possibly exculpatory evidence was disclosed to defendant's

counsel around May 15, 2001 in time for him to cross examine Dr. McGee or any witness that testified concerning an opinion that the strangulation had occurred with a telephone cord. No exculpatory evidence concerning the fibers was withheld from plaintiff.

Plaintiff also claims that defendant Trapp falsified plaintiff's polygraph report but has presented no evidence to show that the report was false. In addition the report was not used against him so it was not material to his guilt or innocence.

Plaintiff's claim that he was denied due process because of the coercion of witnesses or the denial of exculpatory evidence must fail. All the evidence was provided to plaintiff's trial counsel. Any discrepancies in witness recollections or time accounts could have been addressed by plaintiff's counsel at trial. As a result of plaintiff's trial counsel failure to do so, the Wisconsin Court of Appeals found counsel ineffective and granted plaintiff a new trial. Plaintiff was not denied due process by the defendants.

Plaintiff also contends that defendants Larsen and Trapp manufactured evidence of animal hairs on Thompson's black bra before his second trial. There is absolutely no evidence to show that defendant Larsen or defendant Trapp manufactured this evidence. Instead defendant Larsen tested evidence which had been filed in the first case but never analyzed. Any claim that the animal hair was planted by defendants Larsen and Trapp in 2004 is

not believable because the animal hairs were in evidence in 2000. These animal hairs were found to be consistent with hair on Evan Zimmerman's dog. In addition this evidence was never used against plaintiff at his first trial and his second trial was dismissed. The testing of this evidence did not violate plaintiff's due process rights.

Plaintiff further contends that defendant Larsen lied under oath. Larsen testified that DNA testing of cigarette butts found at the scene of the crime did not provide any evidence that provided insight into the case. This was not a lie but an opinion of the evidence. Plaintiff's counsel had the DNA results and could have cross examined Larsen to determine that the DNA test specifically precluded plaintiff.

Plaintiff also claims that defendant Larsen lied at trial when he said that a person who had corresponded with Thompson was incarcerated. This was not in fact perjured testimony because the person was under house arrest while on parole and therefore confined at the time the murder occurred.

Plaintiff argues that he was imprisoned without probable cause. The existence of probable cause is an absolute bar to a § 1983 claim for false imprisonment. Fernandez v. Perez, 937 F.2d 370 (7th Cir. 1991). Judge Lenz found based on defendant Larsen's criminal complaint that there was probable cause that plaintiff committed the murder of Kathy Thompson. Judge Wahl found at the

preliminary hearing that there was probable cause to bind the plaintiff over for trial. A jury convicted plaintiff of the murder and the Court of Appeals found that the evidence introduced at trial was sufficient to sustain the jury's verdict.

Plaintiff has not presented any evidence to dispute the facts upon which probable cause was found. Since the facts are not disputed and there is no evidence presented of any false or fabricated evidence the Court finds as a matter of law that there is a reasonable basis for the existence of probable cause to arrest and imprison plaintiff for the murder of Thompson. Beauchamp v. City of Noblesville, 320 F.3d 733, 746 (7th Cir. 2003). Defendants are entitled to judgment as a matter of law on plaintiff's false arrest claim.

Plaintiff's constitutional rights were not violated by defendants. Accordingly, plaintiff's claims of conspiracy to violate his constitutional rights and failure to intervene to prevent a violation of his constitutional rights must also be dismissed.

In the interests of justice the Court will address defendants' motion for summary judgment on plaintiff's state law claim. To pursue state law claims, plaintiff is required under Wis. Stats, §893.80(1) to serve a written Notice of Circumstance of the claim and a Written Claim containing an itemized statement of relief sought before commencing an action. Plaintiff concedes that he did

not file either the notice or claim. Accordingly, plaintiff's state law claims must be dismissed.

ORDER

IT IS ORDERED that the defendants' motions for summary judgment are GRANTED.

IT IS FURTHER ORDERED that the motion of defendants City of Eau Claire, Larsen, Foster and Adams to strike and dismiss claims are DENIED as moot.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants and against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 12th day of September, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge