

Younger Oswald could get new trial

Supreme Court decides not to review federal appeals court decision

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Waukesha - Ted Oswald, imprisoned with his father for a notorious 1994 crime spree that left a police captain dead, could be back in a Waukesha courtroom in as little as two weeks after the U.S. Supreme Court on Monday refused to consider prosecutors' request to reinstate his conviction.

The decision by the high court not to review a federal appeals court decision granting Oswald a new trial left prosecutors reassembling their case a decade after shelving it.

"There's a feeling of disappointment, but not surprise," Waukesha County District Attorney Paul Bucher said.

"We knew we faced an uphill battle," he said of persuading the nation's highest court to take the case. "But in a case like this it's something we had to do."

Bucher said the witnesses he needs to retry Oswald "are available and ready to go," but added that readying the case for trial was a painstaking process.

"It's going to be a challenge just getting it back into the shape you need for a trial, because it's such an enormous case," he said.

Bucher also said he would not rule out plea negotiations if they are initiated by the defense.

"I never rule out anything," Bucher said. "I never say 'no.'"

"I can't tell you what kind of discussions there might be. That depends on what type of discussions, if any, they are willing to have."

Oswald's attorney, Jerome Buting, who was "pleased but not surprised" by the Supreme Court decision, said it would be improper to discuss possible moves he was weighing.

"That certainly is a possibility," he said of potential plea negotiations. "But, obviously, negotiations can't take place in the media."

Buting said it was possible that further legal steps could be taken in federal court, where he recently indicated he was considering a double jeopardy challenge.

Oswald, 28, was 19 when he and his father, James Oswald, now 59, were convicted of a crime spree that included robbing a bank and two credit unions, killing Waukesha Police

Capt. James Lutz, wounding two other officers, stealing vehicles and entering a rural Pewaukee home and kidnapping the resident.

Jury bias at issue

U.S. District Judge Lynn Adelman overturned the younger Oswald's convictions and life imprisonment sentence in March 2003, ordering that he be freed or receive a new trial because of juror bias. On June 29, a 2-1 ruling of the 7th Circuit U.S. Court of Appeals in Chicago upheld Adelman's decision.

Both decisions relied primarily on the conclusion that Waukesha County Circuit Judge Lee Dreyfus Jr., who presided over the case, and, later, the state Court of Appeals, wrongly overlooked evidence that during four days of jury selection, jurors improperly discussed the case and exchanged views that the trial would be a waste of time because Ted Oswald was clearly guilty.

In July, state Assistant Attorney General Warren Weinstein asked for a rehearing in the federal appeals court, a request that was denied.

On Sept. 23, Weinstein petitioned the Supreme Court to review the appellate court decision.

Ted Oswald, who is currently incarcerated at the Waupun Correctional Institution, was convicted after a trial in 1995. During the trial, Oswald admitted to taking part in the crime spree. He also described a bizarre childhood that the defense hoped would show he had been forced into a violent life of crime by his father.

Oswald was represented by the state public defender's office during his trial, but Buting has represented him since 1996 in post-conviction hearings in circuit court, state Court of Appeals proceedings, an unsuccessful petition to the state Supreme Court and in federal court, where he has now prevailed at three levels.

"Adelman was wrong and, unfortunately, another jury is now going to have to hear the facts of this case, and the witnesses and victims are going to have to relive it all," Bucher said Monday.

Lutz's family declined to comment.

Waukesha Police Capt. Mike Babe said he was disappointed.

"We feel bad for all the people affected, especially the Lutz family," Babe said.

City of Pewaukee Chief Gary Bach said Monday that a new trial for the younger Oswald is a "waste of time, waste of emotion and a waste of money."

"But the end result will be the same," Bach said.

Bucher said it was his understanding that with his order, Adelman declared that Oswald be given a new trial within 180 days. The clock did not start, however, as long as prosecutors appealed the order for a new trial.

"I don't know what would happen if we didn't do it in that time period," Bucher said.

Double jeopardy cited

In a brief filed in federal court last month, Buting contended that "serious double jeopardy concerns" could prevent a retrial.

"Prosecutorial and judicial overreaching are among the policies that double jeopardy protects against," Buting wrote in the brief.

"The petitioner believes that the record reveals extreme overreaching by both the prosecutor and the judge to subvert the fairness of the trial by impaneling a jury deeply biased in favor of the prosecution."

Buting noted that with its ruling, the federal appellate court said "the prosecutor . . . made every possible effort to prevent the judge's determining whether jurors were biased."

James Oswald also has alleged juror bias in a petition filed in U.S. District Court in Milwaukee, a matter that still is pending.

Journal Sentinel reporter Jacqueline Seibel contributed to this report.