STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 17 AP 2443 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARK G. MCCASKILL,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
NOVEMBER 30, 2017, IN THE CIRCUIT COURT
FOR PORTAGE COUNTY, BRANCH II,
THE HONORABLE ROBERT J. SHANNON PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a denial of a postconviction motion. On August 31, 2011, around 12:39 a.m., Village of Plover police officers were dispatched to a residential neighborhood based on a call that a car was parked outside a residence with its lights on.[1] When police made contact with Mr. McCaskill, he was sitting in the driver seat not wearing socks, shoes, or a shirt.[2] His car was not running, and the keys could not be located.[3]

After transporting Mr. McCaskill to a local hospital, hospital staff drew his blood for alcohol testing.[4] The blood came back at a 0.263 BAC.[5] At trial, the analyst who tested Mr. McCaskill's BAC testified that it could have been as high as 0.29 at the time officers located him.[6] Throughout police's contact with him, Mr. McCaskill was in and out of consciousness.[7] Police were unable to gather much information, other than he was at an ex-girlfriend's home earlier that night, where he had a margarita.[8]

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[1] R.17 at 89:5–7.
[2] Id. at 82:9–11; Id. at 90:2–3.
[3] R.17 at 82:12–13. At trial, Officer Thomas testified he did not recall whether police found Mr. McCaskill's keys. R.17 at 112:24.
[4] R.17 at 114:19.
[5] Id. at 104:20–21.
[6] Id. at 106:16–17.
[7] Id. at 110:8–20; Id. 113:22–23.
[8] Id. at 84:8–15.

In September 2011, Mr. McCaskill was charged with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, both as fourth offenses.[9]

On January 17, 2012, Mr. McCaskill filed a suppression motion.[10] In the motion, he argued police had unlawfully arrested him for OWI.[11] More specifically, because neither the police nor any witness could testify they had seen him driving the rental vehicle, the police had arrested him without probable cause to believe he had been operating a vehicle while under the influence of an intoxicant.[12] On November 2, 2012, the circuit court denied Mr. McCaskill's suppression motion.[13]

On November 13, 2014, the Honorable John Finn presided over a jury trial. The facts were undisputed regarding driving the vehicle; no one observed Mr. McCaskill operate it. The State argued that Mr. McCaskill, inebriated, drove his vehicle to its found location.[14] It further argued that Mr. McCaskill must have driven his

[9] R.23.
[10] R.28.
[11] Id.
[12] Id.
[13] R.58 at 45:16–17.
[14] R.17 at 79:11-12.

vehicle to Plover Springs Drive, and he must have been intoxicated when he did it. It stated in opening statements:

> Cars don't drive themselves. Cars are not – at least at this point in time, I believe – to just be teleported to a specific location. That car got there. It got there somehow. Somebody drove it. Rented to the defendant… and he's sitting in the driver's seat.[15]

At closing arguments, the State continued its focus on the issue of driving, while acknowledging that no one had witnessed Mr. McCaskill driving, "The issue is how the car g[ot] there."[16] The State concluded, "I don't think anybody here thinks that the car just miraculously appeared in Plover Springs Drive in the Village of Plover."[17]

At trial, the defense did not contest that at the time police made contact with him, Mr. McCaskill was intoxicated--and therefore well over his prohibited alcohol concentration. However, the defense argued the State had not proven Mr. McCaskill had been in the same inebriated condition at the time he operated.[18] The State had not presented any witnesses to testify they had observed Mr. McCaskill driving.[19] Nor had the State presented any other type of

[15] Id. at 78:24–79:4.
[16] Id. at 157:2.
[17] Id. at 158:7–10.
[18] Id. at 171:11-19.
[19] R.17 at 167:16.

witness on the issue.[20] Ultimately, both parties agreed the issue for the jury was whether Mr. McCaskill had been intoxicated and had possessed a prohibited alcohol concentration at the time he parked his vehicle.

On November 14, 2014, the jury, in a split verdict, found Mr. McCaskill not guilty of operating a motor vehicle while intoxicated. It found him guilty of operating a motor vehicle with a prohibited alcohol concentration.

On July 17, 2015, Mr. McCaskill appealed the circuit court's denial of his suppression motion. In his appeal, he argued that because there had been no direct evidence at trial that he had operated his vehicle, his arrest was unsupported by probable cause.[21] On July 21, 2016, the Court of Appeals upheld the circuit court's denial of his suppression motion.[22]

On February 3, 2017, Mr. McCaskill filed a postconviction motion in this matter, arguing that he should be granted a new trial based on newly discovered evidence. More specifically, Mr. McCaskill argued that because he had only recently learned that Kimm Fonti, the friend with whom he had visited the night of his

[20] Id.
[21] ***State v. McCaskill***, 2016 WI App 67, ¶ 8, 371 Wis. 2d 565, 884 N.W.2d 535.

arrest, knew of relevant information on the timing, events, and his whereabouts that night, he was entitled to a new trial based on newly discovered evidence.[23]

On July 18, 2017, and November 22, 2017, the circuit court, the Honorable Robert Shannon presiding, heard testimony and argument on Mr. McCaskill's postconviction motion.[24] Ms. Fonti was called to testify at that hearing.[25] At the hearing, Ms. Fonti testified she had recently reconnected with Mr. McCaskill through his appellate counsel to discuss the events surrounding the night of his arrest.[26] Ms. Fonti also testified she lives on Woodduck Lane, a short distance from where Mr. McCaskill was found on August 31, 2011.[27] Not long after this incident on August 31, 2011, Mr. McCaskill moved to Colorado.[28] The two maintained only minimal contact; Ms. Fonti testified that Mr. McCaskill would periodically contact her to check on his home in Plover.[29] Given his high BAC on the night of his arrest, as well as the fact Mr. McCaskill and Ms. Fonti drifted apart in the subsequent years, he only recently learned

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[22] ***McCaskill***, 2016 WI App 67, ¶ 16.
[23] R.4.
[24] R.18; R.19.
[25] R.19 at 4.
[26] Id. at 9:21-24; Id. at 10:1–3.
[27] Id. at 4:24.
[28] R.18 at 8:16.
[29] R.19 at 17:23–24.

she can provide testimony that would have been essential to his defense at trial.

Based on Ms. Fonti's recollections, Mr. McCaskill was able to form a timeline of the night of his arrest. On August 31, 2011, Mr. McCaskill visited Ms. Fonti at her residence on Woodduck Lane.[30] He arrived sometime after 10:00 p.m.[31] When he arrived, he was not intoxicated.[32] Mr. McCaskill and Ms. Fonti consumed margaritas at her residence.[33] During their time together, Mr. McCaskill became intoxicated. After approximately an hour, Ms. Fonti's daughter awoke, and she left Mr. McCaskill alone in her kitchen.[34] After she had put her daughter back to bed, Ms. Fonti found that Mr. McCaskill had left her residence.[35] Presumably, Mr. McCaskill left the residence, walked to his vehicle, and then went to sleep in his vehicle until he was found by officers.

On November 28, 2017, the circuit court denied the motion. The circuit court agreed that Mr. McCaskill met the four-pronged test from ***McCallum***, holding that, "Accordingly, the court finds that

[30] R.19 at 5:16–17.
[31] Id. at 6:14–15.
[32] At the postconviction motion hearing, Ms. Fonti testified she could not say Mr. McCaskill was intoxicated or impaired when he arrived. Id. at 8:8.
[33] Id. at 6:21.
[34] Id. at 15–17.
[35] Id.

the present motion satisfies the initial factors required."[36] The circuit court found that Ms. Fonti's testimony was evidence discovered after Mr. McCaskill's conviction, and he had not been negligent in seeking her testimony.[37]In addition, the circuit court held the information was material to Mr. McCaskill's defense and it was not cumulative.[38] However, it denied the motion based on a second test from ***McCallum***, which required the Court to determine whether the jury would have reached a different result, had it heard Ms. Fonti's testimony.[39] The postconviction court held there was no reasonable probability that a jury would not have reached a different result after having heard the evidence at issue.[40]

On December 13, 2017, Mr. McCaskill appealed the circuit court's denial of his postconviction motion to this Court.[41]

[36] R.4 at 2; ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997).
[37] R.4 at 2.
[38] Id.
[39] ***McCallum***, 208 Wis. 2d at 473.
[40] R.4 at 3; Id.
[41] R.7.

ARGUMENT

I. MR. MCCASKILL IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

A. Standard of Review

An appellate court does not give deference to a circuit court's rulings on questions of law.[42] A circuit court's findings of fact are upheld on appeal unless they are clearly erroneous.[43] Therefore, in this matter, the review is *de novo* of the ruling made by the trial court based on the facts as they were found by that court.

B. Mr. McCaskill meets the criteria for a new trial based on newly discovered evidence.

A defendant is entitled to a new trial based on newly-discovered evidence if he proves:

> (1) [T]he evidence was discovered after conviction;
> (2) [T]he defendant was not negligent in seeking the evidence;
> (3) [T]he evidence is material to an issue in the case; and
> (4) [T]he evidence is not merely cumulative.[44]

If a defendant proves all four criteria by clear and convincing evidence, then a court must determine whether a reasonable probability exists that a different result would be reached in a new

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[42] ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711 (1985).
[43] ***State v. Hintz***, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.
[44] ***State v. McCallum***, 208 Wis. 2d at 473.

trial.[45] The circuit court found that Mr. McCaskill met the four factors.

(1) The evidence was discovered after his conviction.

While Ms. Fonti and Mr. McCaskill were friends, they did not remain in contact during the trial proceedings.[46] The parties were also physically distant, as Mr. McCaskill had moved to Colorado.[47] It was only shortly before Mr. McCaskill filed his postconviction motion that Ms. Fonti and Mr. McCaskill spoke of the night of his arrest, and Ms. Fonti revealed she knew details of the evening of the arrest of which Mr. McCaskill was not aware.[48] Ms. Fonti's information was not known to him while his case was pending with the trial court. As such, this evidence was discovered long after Mr. McCaskill's trial and subsequent conviction.

(2) Mr. McCaskill was not negligent in seeking the evidence.

Because he drifted apart from Ms. Fonti once he moved, Mr. McCaskill was not negligent in seeking the evidence at hand. On the night police arrested him, Mr. McCaskill was extremely intoxicated. Almost two hours after police discovered him, Mr. McCaskill's BAC

[45] ***Id.***
[46] R.19 at 10:3.
[47] R.18 at 8:16.
[48] Id. at 9:21–24; Id. at 10:1–3.

was 0.263.[49] Once he could respond and speak coherently to police, Mr. McCaskill told them the last thing he remembered was being at his ex-girlfriend's home.[50] Because he was so impaired that night, Mr. McCaskill was unable to recall the events of August 31, 2011. He did not know how he ended up in his vehicle after being at Ms. Fonti's home.[51] After August 31, 2011, he did not stay connected with Ms. Fonti and did not know of the information she has now provided. He certainly did not know her testimony would have been relevant to his defense.

(3) The evidence is material to an issue in the case.

At trial, the main issue was how Mr. McCaskill's vehicle arrived to be on Plover Springs Drive. If he had not been driving, or if he had not been driving with a prohibited alcohol concentration, he would have presumably been acquitted. For the jury to have reached a guilty verdict on the prohibited alcohol concentration charge, it must have believed Mr. McCaskill drove his vehicle with a prohibited alcohol concentration before he parked it on the street. Yet there is no evidence to suggest Mr. McCaskill drove after he consumed alcohol with Ms. Fonti. Given that when police made

[49] R.19 at 104:20–21; R.19 at 106:9–11.
[50] Id. at 84:8–15.
[51] Id.

contact, the vehicle was not running, and Mr. McCaskill did not have its keys, the issue of operating was in question at trial.[52] Ms. Fonti's testimony would have shown Mr. McCaskill drove to her residence, parked his car, and *then* consumed alcohol. Ms. Fonti's testimony is thus material to the issue of driving.

(4) The evidence is not merely cumulative.

At trial, the defense did not dispute that Mr. McCaskill had a BAC greater than 0.02.[53] The only issue it disputed then, and present counsel disputes now, is whether Mr. McCaskill was operating a vehicle at the time his BAC was greater than 0.02. When police found him, Mr. McCaskill was in a vehicle rented to him.[54] There were no signs that anyone else had driven the vehicle.[55] But at trial, the State could not produce any evidence on how the vehicle arrived at its position on Plover Springs Drive. Ms. Fonti's testimony would have provided important evidence on how Mr. McCaskill ended up asleep in his vehicle on the side of the road. This would have been evidence the jury had not previously received. Because there was no evidence presented as to how Mr. McCaskill and his vehicle arrived at Plover Springs Drive, this evidence is not cumulative.

[52] R.17 at 82:12–13
[53] Id. at 47:13–16; R.17 at 157:1–2.
[54] Id. at 92:20.

The trial court ruled that Mr. McCaskill had met all four prongs and that Ms. Fonti's testimony is newly discovered evidence.[56]

C. A reasonable probability exists that the jury would have reached a different result at trial, had it heard Ms. Fonti's testimony.

The evidence that the State presented to the jury was circumstantial. This evidence was enough to satisfy the jury that Mr. McCaskill drove his vehicle with a prohibited alcohol concentration. The defense presented no evidence to dispute the State's argument. Instead, it argued the State had not met its burden.[57] Had Ms. Fonti's testimony been available at trial, it would have provided answers to the ultimate question before the jury: How did Mr. McCaskill end up asleep and intoxicated in his vehicle where police found him?

Had she testified, Ms. Fonti's testimony would have provided the jury with information that Mr. McCaskill had been consuming alcohol with her, left her residence while she was tending to her awoken child, and then went to sleep in his vehicle. Given the lack of evidence at trial for why Mr. McCaskill was parked along the side of Plover Springs Drive, Ms. Fonti's testimony would have been

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[55] Id. at 90.
[56] R.4 at 2.
[57] R.17 at 171:11–19.

decisive. Because the State did not bring forward any direct evidence that Mr. McCaskill had operated the vehicle, Ms. Fonti's testimony would have allowed the defense to better challenge the State's circumstantial evidence of driving. It would have provided the jury with a reasonable hypothesis on just why Mr. McCaskill was found by police in his rental vehicle without having operated it with a prohibited alcohol concentration. "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have reasonable doubt as to the defendant's guilt.'"[58] Had the jury heard Ms. Fonti's testimony, there is a reasonable probability that the jury would have acquitted Mr. McCaskill.[59]

[58] ***State v. Plude***, 2008 WI 58, ¶ 33, 310 Wis. 2d 28, 750 N.W.2d 42, citing ***State v. Love***, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 700 N.W.2d 62.

[59] *See* Criminal Jury Instruction 140, "If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty."

CONCLUSION

Because he satisfies the ***McCallum*** factors for a new trial based on newly discovered evidence, Mr. McCaskill is entitled to a second trial.[60] He discovered Ms. Fonti's testimony would be relevant to his defense only after the court convicted him. He was not negligent in discovering so, since he and Ms. Fonti did not maintain contact after he moved to Colorado. Nor would he himself have independently recollected the night of his arrest; he was simply too intoxicated to recollect much of anything. In addition, the proposed evidence is both material and noncumulative—Ms. Fonti's testimony would have been the only evidence presented on the issue of driving.

Lastly, Ms. Fonti's testimony would have been significant enough to have potentially acquitted Mr. McCaskill of the prohibited alcohol concentration charge. The State relied upon circumstantial evidence on the issue of driving. Given her testimony goes directly to one of the elements of the prohibited alcohol charge, had it been presented, the jury could have acquitted Mr. McCaskill. For all the reasons indicated, Mr. McCaskill asks this Court to reverse the trial court's ruling denying him a new trial.

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[60] ***McCallum***, 208 Wis. 2d at 473.

Dated at Madison, Wisconsin, April 20, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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SARAH M. SCHMEISER
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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
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I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: April 20, 2018.

Signed,

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APPENDIX TABLE OF CONTENTS