STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP2443-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK MCCASKILL,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER REGARDING THE DEFENDANT'S MOTION FOR NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH 2, THE HON. ROBERT SHANNON PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Whether the defendant presented newly discovered evidence entitling him to a new trial, when his friend testified she consumed alcohol with him at her residence on the evening of his arrest, but did not know how he arrived or left her residence.

The circuit court denied the motion, concluding it was not reasonably probable a second jury would reach a different result.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication, as this case involves the application of well-settled law.

STATEMENT OF THE CASE AND FACTS

This matter is quite old. McCaskill was originally arrested for OWI 4th almost seven years ago, on August 31, 2011, at 12:39 AM, in the Village of Plover. (23). According to the criminal complaint, Village of Plover police officers responded to 1801 Plover Springs Drive, for a report of a vehicle parked next to the road with its lights on for an extended time. Officers approached the vehicle and found a white male with no shirt and bare feet in the driver's seat. The male subject was unresponsive. Officers smelled the strong odor of intoxicants coming from the subject. (23). Officers conducted a blood draw, and a later result showed the BAC level of .263. (23). McCaskill said he was at his former wife's home where she gave him a margarita and he could not remember anything after that. (23). The State charged McCaskill with both operating while intoxicated (OWI) 4th and operating with a prohibited alcohol concentration (PAC) 4th.

A jury trial was held on November 13th and 14th, 2014. (17). During opening statemetns, McCaskill's attorney described McCaskill's condition on the night in

question as "rip-roaring drunk." (17:47). McCaskill's attorney stipulated that McCaskill had three prior alcohol-related convictions, making this a fourth offense. (17:74). The defendant's argument at trial was that the State could not prove McCaskill had driven the vehicle, as he was found in the vehicle without the keys and the car was not running. (17:84).

Officer Pagel of the Plover Police Department testified that he and Officer Thomas responded to Plover Springs Drive on August 31, 2011, shortly after midnight. (17:88). Officer Pagel located an unresponsive driver and attempted to determine the reason. (17:91-92). Officer Pagel located an unopened bottle of wine and a receipt showing the vehicle had been rented. (17:92). The rental receipt showed that Mark McCaskill rented the vehicle earlier that night. (17:93). Officer Pagel testified that Officer Thomas found the driver's operator license, and that also showed the name Mark McCaskill. (17:94). Officer Pagel could not remember if they keys were in the car. (17:95). Officer Pagel could not remember if the vehicle was running. (17:90).

Officer Thomas testified that he responded with Officer Pagel to 2801 Plover Springs Drive, regarding a citizen call about a car parked there with lights on for about an hour. (17:108). Officer Thomas found the only occupant, an unconscious driver, opened the door, and smelled the odor of alcohol beverages. (17:113). While waiting for the ambulance, the driver vomited and the smell of alcohol became stronger. (17:113). McCaskill was the only person listed on the rental vehicle paperwork. (116). Officer Thomas "could not say for certain" whether the vehicle keys were located. (17:112).

McCaskill stipulated he rented the vehicle from Hertz Rental in Mosinee on August 30th, 2011, at 8:07 PM, about four and a half hours before officers found him on Plover Springs Drive. (17:136). McCaskill also stipulated that his blood was properly drawn by a medical technician at St. Michael's Hospital in Stevens Point.

(17:135). McCaskill did not testify, and presented no other evidence.

An analyst from the State Lab of Hygiene testified that he tested the defendant's blood. (17:97). The result showed McCaskill had a .263 BAC level.

McCaskill's attorney argued that McCaskill should not be found guilty because the State had not proven the case beyond a reasonable doubt. According to the attorney:

> You can find reasons to find Mr. McCaskill guilty. They're there. Very likely explanation is that he drove himself there and and he was so drunk that he just pulled over and they found him an hour or two or wathever later. That's one explanation. And if you're searching for guilt, that's probably what you're going to find. But if you search for the truth, you're going to have to say to yourselves, I'm not sure. I don't know. This is a mystery they haven't solved. And the government has the burden to do that. (17:167-168)

The jury found McCaskill not guilty of perating while intoxicated, and guilty of perating with a prohibited alcohol concentration. (15:4).

McCaskill appealed his conviction to the Court of Appeals. ***See State v. McCaskill***, 2015AP1487-CR. In that appeal, McCaskill raised four issues, including a collateral attack issue, a suppression of evidence issue, sufficiency of the evidence, and real controversy not tried. In an unpublished one-judge opinion dated July 21, 2016, the Court of Appeals rejected each of these issues and affirmed the conviction. McCaskill filed a petition for review which was denied on November 14, 2016.

McCaskill filed a postconviction motion for a new trial based on a newly discovered evidence claim. That motion is not in the record provided to the Court of Appeals. On July 18, 2017, the Court began a hearing to address the postconviction motion. (18) The Court continued the hearing on November 22, 2017. (19). On

November 22, 2017, McCaskill called Kim Fonti as a witness. (19:4).

Fonti testified that she knows McCaskill, and that she saw him the night of August 30, 2017. Fonti lives at 1441 Wood Duck Lane, in Plover, WI. (19:4). McCaskill called Fonti on August 31st, 2017, to say he may stop at her residence.[1] McCaskill arrived at her residence that evening around 10:00 P.M. (19:6). McCaskill had one drink at her residence, and she used a shot glass to measure one shot of alcohol. (19:7; 19:18). Fonti did not know whether McCaskill was already impaired by alcohol when he arrived at her residence. (19:8). Fonti left the room to check on her child a short time later, and when she returned McCaskill was gone. (19:8). Fonti said she is not able to see people who arrive at her residence, so she does not know whether McCaskill came in a vehicle. (19:9). Fonti also reported that she heard from another friend that McCaskill was at Mikey's, a local bar and restaurant, earlier that night. (19:12). Fonti identified her residence on Exhibit 1, a map presented to her during her testimony. (19:15; 2, R-Ap 1). Fonti said she never spoke to McCaskill about the night, but heard from Tracey & Associates about a year before the postconviction hearing to discuss the encounter with McCaskill. (19:16-17). Fonti never had a conversation with McCaskill about the night in question.

The circuit court, Hon. Robert Shannon, issued a written Memorandum Decision and Order on November 28, 2017. In that decision, the court determined:

> [T]he Court accepts [McCaskill]'s assertion that he only recently became aware the he visited Ms. Fonti on the evening in question and that he was not negligent or dilatory in making the discovery

[1] The evidence at trial showed that this incident occurred the night of August 30, 2011, into the early hours of August 31, 2011. Fonti testified that she heard from McCaskill on August 31, 2011. (19:5) This testimony is problematic for this reason, through Fonti does say at one point that she is not certain of the date, just that "… it was August. I have no inkling on what the exact day was." (19:13)

> that she could testify as she did at the hearing on this motion. (4:1; A-Ap: A-2)

The court then concluded that the four factors required by McCallum for newly discovered evidence were met, based on these assumptions. The court further concluded that it was not reasonably probable that a new jury would find a different result. According to the court, it is possible that McCaskill spent two hours shirtless and wandering the three-fourths of a mile from Fonti's residence to where his vehicle was parked on Plover Springs road. The court further determined that it was not satisfied there was a reasonable probability a jury would so conclude. The court noted that through this additional information may provide some context to the evening, if accurate and true, it does not show sufficient evidence to provide a different result at trial.

McCaskill now appeals the circuit court's decision regarding his motion for a new trial on newly discovered evidence.

ARGUMENT

I. MCCASKILL DID NOT ESTABLISH THAT HE IS ENTITLED TO A NEW TRIAL ON NEWLY DISCOVERED EVIDENCE

A. Standard of Review.

The State concurs with McCaskill regarding the appropriate standard of review in this matter. Reivew of the legal conclusions of the circuit court in this matter is de novo***. State v. Pitsch,*** 124 Wis.2d 628, 369 N.W.2d 711 (1985). Factual findings of the circuit court are upheld unless they are clearly erroneous. ***State v. Hintz***, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.

B. The circuit court erred by finding facts unsupported by the record

The circuit court issued a memorandum decision and order reciting it's factual findings and legal conclusions about McCaskill's postconviction motion. (4). In that memorandum, the circuit court found facts which could not be found based on the evidentiary record. McCaskill did not testify in the postconviction hearing, nor did he testify at trial. Despite this fact, the circuit court found:

> Giving Mr. McCaskill the benefitof the doubt that he has little to no memory of the evening in question in light of his extraordinarily high blood alcohol level, the Court accepts his assertion that he only recently became aware that he visited Ms. Fonti on the evening in question and that he was not negligent or dilatory in making the discovery that she could testify as she did at the hearing on this motion.

There is no testimony in the record which would support two important factual findings of the circuit court. First, there is no evidence in the record that McCaskill has a lack of memory due to high alcohol level. There may be argument from his attorney, but not evidence. This finding is thus clearly erroneous.

There is also no testimony which would support the conclusion that McCaskill only recently became aware that Fonti had information regarding this situation. Fonti was not sure of the date of this encounter with McCaskill, and said she only knew about the issue by speaking to "Tracey and Associates." McCaskill provided no additional testimony to show how he learned, discovered, or came to remember this encounter. The court's finding that McCaskill "only recently became aware" of the encounter is clearly erroneous.

Finally, the circuit court improperly shifted the burden in order to make these factual findings. The circuit court's statement that it would give McCaskill the "benefit

of the doubt" is improper given that McCaskill has the burden of proof in a motion regarding newly discovered evidence. ***State v. McAlister***, 2018 WI 34, ¶30-32.

The circuit court's two factual findings, that McCaskill has no memory of the night in question, and that he only recently learned of the encounter with Fonti, are clearly erroneous. This Court should find that those facts were not established by the evidence at the postconviction motion hearing.

C. The newly discovered evidence test.

A claim of newly discovered evidence is subject to a multi-part analysis. In this analysis, the defendant must provide sufficient information to show that the conviction is a manifest injustice. ***State v. McAlister***, 2018 WI 34, ¶30 (*citing* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis.2d 28, 750 N.W.2d 42).

A defendant must show specific facts that are sufficient by clear and convincing proof, when considered in the context of the record as a whole, that:

> (1) The evidence was discovered after conviction;
>
> (2) the defendant was not negligent in seeking the evidence;
>
> (3) the evidence is material to an issue in the case; and
>
> (4) the evidence is not merely cumulative. ***McAlister***, ¶ 31-32

If the defendant is able to meet the four criteria, the court "must determine whether a reasonable probability exists that a different result would be reached in a trial." ***McAlister***, ¶31-32 (citations omitted). 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 a

reasonable doubt as to the defendant's guilt." ***State v. Love***, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 700 N.W.2d 62 (*citing* ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997)).

D. McCaskill failed to meet the four-part test.

McCaskill did not provide sufficient information to meet the first part of the newly discovered evidence test. McCaskill did not testify at the postconviction hearing in the circuit court. The only evidence provided is the testimony of Kim Fonti, which was inadequate to meet the four-factor test. Fonti testified that she is not sure on what date in August 2011 McCaskill came to see her. It may have been August 31st, according to her, but that would be the evening following McCaskill's arrest for OWI and PAC offenses. (19:5; 19:13).

(1) McCaskill failed to show the evidence was discovered after conviction. McCaskill did not testify, nor did Fonti provide any testimony about the timing of the discovery. McCaskill is the person who went to Fonti's residence on this occasion, and so he certainly should know that he was there. McCaskill would presumably have known this fact before his conviction, absent some convincing evidence to the contrary. Because McCaskill presented no testimony regarding this factor, and because the defense has the burden of proof on the four part test, the circuit court's finding that McCaskill met this part of the test should be rejected. The circuit court's statement in the memorandum decision that it "accepts his assertion he only recently became aware…" is wrong, as it is based on nothing in the evidentiary record. McCaskill did not testify, and made no assertions about this issue. This Court should decide that the factual finding was clear error, and that the factor was not proven.

(2) McCaskill did not provide evidence that would allow the court to determine whether the defendant was negligent in seeking the evidence. Fonti testified that she

first heard about this issue from "Tracey and Associates" about a year before the postconviction motion hearing. (19:16-17). No other evidence was presented to establish whether McCaskill was negligent in seeking the evidence. Because McCaskill has the burden, and presented no evidence on this issue, the Court should find that the circuit court's finding on this factor was erroneous. There was no evidence establishing that McCaskill was not negligent in finding the evidence. The case has been pending for almost seven years. This begs the question – how did the information reveal itself after six years? McCaskill provided no evidence regarding this factor, and because he has the burden of proof, the Court should determine he has not proven this factor.

(3) McCaskill did not explain how the evidence is material to an issue in the case. The circuit court pointed out in the written memorandum decision that Fonti's testimony may provide some context to the situation, but does not provide evidence that is material to an issue in the case. Fonti did not know whether McCaskill was driving or not, and did not know for sure whether McCaskill had been drinking alcohol before he arrived at her residence. Fonti could not even be sure that the night she testified about was the same night McCaskill was arrested for OWI. The issue was whether McCaskill operated the vehicle he was found in by police officers on August 30-31, 2011, in Plover WI. He was found alone in the rental vehicle extremely impaired by alcohol. His attorney conceded in closing arguments that the most likely explanation is that the defendant operated the vehicle to get it to that location. It is not clear how Fonti's testimony about their brief encounter would be material to an issue in the case. Because the burden is on McCaskill to make such a showing, the Court should find that McCaskill has not prove this factor of the test.

(4) The evidence is not merely cumulative, but is arguably irrelevant. No information about this encounter between Fonti and McCallum was presented during the jury trial. The information is not relevant to a material

issue in the case. That being said, the Court, could arguably find that the evidence is not cumulative.

E. There is not a reasonable probability of a different result at trial based on the new information.

The Court does not need to reach this part of the test, as McCaskill has not met the initial burden of the four-factor test. If the Court does believe that this part of the test must be evaluated, the State points out that McCaskill has not provided any explanation at all regarding the significance of Fonti's testimony.

Fonti's testimony, at best, shows that McCaskill drank alcohol on a night when he had a .263 BAC, and was discovered unconscious, shirtless and shoeless behind the wheel of a rental vehicle, on the side of a residential street, with lights on, for about an hour. Fonti's testimony does not shed any light on the circumstances leading McCaskill into those circumstances.

McCaskill's brief states that Fonti's testimony "would have provided the jury with a reasonable hypothesis," which would explain how McCaskill could be in this situation without operating the vehicle. The implication of this statement is that McCaskill could have walked from Fonti's residence to the location where his vehicle was parked. However, the map provided as exhibit 1 during the postconviction hearing, and the Court's finding that the two locations were separated by three-quarters of a mile, contradict that supposition.

As the defense points out, a reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. The clear answer is that a jury would not have a reasonable doubt based on Fonti's testimony. As the circuit court pointed out, though it is possible that

McCaskill parked three-quarters of a mile from Fonti's residence and walked there to have a drink with her, then stumbled back to his vehicle shirtless and shoeless, at a .263, it is quite unlikely. The only reasonable conclusion from Fonti's testimony, if the incident occurred on the same day McCaskill was at her residence, is that McCaskill drove from her residence and stopped along the side of the road. There is not a reasonable probability of a different result at trial based on Fonti's testimony.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's denial of the defendant's motion for a new trial on newly discovered evidence, and remand the matter to the circuit court for reinstatement of the sentence.

Dated this 27th day of April, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3672 words.

Dated this 27th day of April, 2018.

_____

Michael D. Zell
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27rd day of April, 2018.

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Michael D. Zell
Assistant District Attorney

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