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

REPLY BRIEF 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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ARGUMENT

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

A. The circuit court correctly decided Mr. McCaskill met the four-prong *McCallum* test for newly discovered evidence.

As stated in the defense brief-in-chief, 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.[1]

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 trial.[2] The circuit court found that Mr. McCaskill met the four factors. In its decision, the circuit court stated:

> Giving Mr. McCaskill the benefit of 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.[3]

[1] ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).
[2] ***Id.***
[3] R.4 at 2.

Throughout its brief, the State argues Mr. McCaskill did not testify at his postconviction motion hearing, and therefore the circuit court could not rely on anything in the record to hold Mr. McCaskill satisfied the ***McCallum*** test.[4] More specifically, the State argues that there is no evidence Mr. McCaskill did not remember the evening and early morning of August 30, 2011 and August 31, 2011.[5] The State also argues there is no evidence Mr. McCaskill recently became aware that Ms. Fonti could provide pertinent information to his defense.[6]

The State has not met its burden to show the circuit court clearly erred in making the above-mentioned factual findings. First, regarding the claim that no evidence existed that Mr. McCaskill did not remember the night of August 30, 2011 and early morning of August 31, 2011, at Mr. McCaskill's jury trial, the Hygiene Lab analyst testified that Mr. McCaskill's blood alcohol content was extremely high.[7] Besides the analyst, Officer Jeffrey Thomas testified that when questioned at the hospital, Mr. McCaskill was unable to remember details from the night and early morning of August 30, 2011 and August 31, 2011, other than he was at an ex-girlfriend's home earlier that night, where he had a margarita.[8]

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[4] State Br. 8; 9; 10; 11.
[5] State Br. 8.
[6] State Br. 8.
[7] R.17 at 106:16–17.
[8] R.17 at 126:10.

Through both trial and appellate counsel, Mr. McCaskill has also maintained he does not remember the evening of August 30, 2011, and early morning of August 31, 2011. At trial, defense counsel told the jury in both opening and closing statements that Mr. McCaskill did not remember much from the evening and early morning of his arrest.[9] Mr. McCaskill also stated this through defense counsel in his postconviction motion, as well as at the motion hearing.[10]

The postconviction court reviewed this record, and inferred Mr. McCaskill did not remember the evening and early morning of August 30, 2011 and August 31, 2011.[11] The court also relied upon defense counsel's assertions that Mr. McCaskill did not remember much from the hours before his arrest. Therefore, trial testimony through the prosecution witnesses, as well as defense counsel's assertions, allowed the postconviction court to conclude Mr. McCaskill may not have remembered the evening of his arrest. Moreover, these inferences were not clearly erroneous. A postconviction court can reasonably infer from the record—and "the

[9] R. 17 at 84:10–13; R.17 at 166:22–24.
[10] R.59 at 3; R.18 at 8:20–21.
[11] R.4 at 2.

reviewing court must accept the inference drawn by the [lower court]."[12]

The State is also incorrect in claiming nothing in the record showed Mr. McCaskill only recently became aware of Ms. Fonti's helpful information. The circuit court had before it Mr. McCaskill's postconviction motion, Kim Fonti's affidavit, and Kim Fonti's testimony.[13] These all established that Mr. McCaskill made the discovery recently. The defense met its burden in showing so, and the State failed to rebut that evidence. While Mr. McCaskill did not testify, Ms. Fonti did. More importantly, she did so based on the circuit court's belief that her testimony would be needed to fairly hear the motion.[14] The court could have relied upon the affidavits and moving papers but chose to also hear Ms. Fonti to see whether she was credible.

At the first postconviction motion hearing date, the court stated it was concerned about the affidavit's brevity. Based on that, the court stated it would order Ms. Fonti to testify, "[S]o that [it] [would be] satisfied that [it] ha[d] the full story from this affiant[.]"[15] There was

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[12] ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249–50, 274 N.W.2d 647, 650 (1979) (discussing the trial judge's role when he or she acts as a finder of fact) (internal citations omitted).
[13] R.59.
[14] R.18 at 12:3–4.
[15] R.18 at 10:15; R.18 at 10:23–24.

therefore no need for Mr. McCaskill to testify; Ms. Fonti's affidavit as well as her testimony supplied the basis for the postconviction motion.[16] Furthermore, neither the defendant nor any other party is required to testify at a postconviction proceeding based on newly discovered evidence. In cases not involving witness recantation, the circuit court may rule on the merits based on the motion alone or an accompanying affidavit.[17]

The State accuses the circuit court with shifting the burden of proof when it wrote it would give Mr. McCaskill the "benefit of the doubt" that he did not remember the evening and early morning of his arrest.[18] Though the court's words show it may not have been completely convinced by Mr. McCaskill's assertion that he did not remember the evening, the court did accept Mr. McCaskill's claim.

(1) The evidence was discovered after Mr. McCaskill's conviction.

As indicated in defense counsel's initial brief, Mr. McCaskill and Ms. Fonti infrequently spoke throughout the years until

[16] *See* ***State v. Simmons***, 57 Wis. 2d 285, 290–91, 203 N.W.2d 887 (1973) (holding that "[W]here the [postconviction] allegations made can only be supported by the submission of additional evidence, an evidentiary showing must be made either by affidavit or by oral testimony.").
[17] *See, e.g,* ***State v. Garner,*** 2001 WL App 1, 249 Wis. 3d 489, 639 N.W.2d 489 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)); *see also* ***McCallum***, 208 Wis. 2d at 476 (ruling that newly discovered evidence based on recantation must be corroborated by other newly discovered evidence).
[18] State Br. 8–9; R.4 at 2.

postconviction counsel contacted Ms. Fonti to potentially testify.[19] The State argues Mr. McCaskill presumably knew he was at Ms. Fonti's residence the night of his arrest.[20] Though Mr. McCaskill knew he had been at her residence, he did not know Ms. Fonti's testimony would be important to his defense. Had he known so, he would have asked her to testify at trial, not years later at a postconviction motion hearing. The State implies, without any evidence, that Mr. McCaskill knew all along Ms. Fonti's testimony could help him. The State does not address exactly how it would serve Mr. McCaskill's interests to know Ms. Fonti could help his case and yet wait to bring forward her testimony years after his conviction. Moreover, the record shows no evidence other than that the helpful nature of Ms. Fonti's testimony was discovered after trial.

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

In the early morning of August 31, 2011, Mr. McCaskill stated to police that the last thing he remembered was being at Ms. Fonti's home.[21] When police were questioning him, his BAC level was very high.[22] Probably because he was so intoxicated that night, Mr.

[19] R.19:16–17.
[20] State Br. 10.
[21] R.17 at 84:8–15.
[22] R.17 at 104:20–21; R.17 at 106:9–11.

McCaskill was incoherent when questioned by police.[23] He likely did not know, or at the very least could not explain to police, how he ended up in his vehicle after being at Ms. Fonti's home.[24]

After the night of his arrest, Mr. McCaskill's memory did not improve. The State declares that Mr. McCaskill presented no evidence establishing he was not negligent in seeking Ms. Fonti's testimony.[25] In fact, Ms. Fonti's affidavit indicated Mr. McCaskill had not maintained frequent contact with her in the years after his arrest.[26] At the postconviction motion hearing, Ms. Fonti echoing her affidavit, testified that she had not stayed in regular contact with Mr. McCaskill.[27] Given that he lived in Colorado and Ms. Fonti lived in Plover, Wisconsin, and given that Mr. McCaskill formed a new life in Colorado, the lack of contact was unsurprising. Because both parties moved on from the incident, and both parties maintained only infrequent contact, Mr. McCaskill brought forward Ms. Fonti's testimony years later. This was not negligent; it was simply the time when Mr. McCaskill learned Ms. Fonti could provide pertinent details of the night of his arrest. The circuit court's findings on this prong of ***McCallum*** were thus not clearly erroneous.

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[23] R.17 at 107:4–6.
[24] R. 17 at 107:4–6; R.17 at 126:10.
[25] State Br. 10–11.
[26] R.59 at 8.
[27] R.19 at 11:3.

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

The State writes that it is unclear how Ms. Fonti's testimony would be material to an issue in the case.[28] It states in a few sections of its brief that Ms. Fonti was not sure whether the date police arrested Mr. McCaskill was the same date he visited her.[29] The State also takes issue with the fact Ms. Fonti says she spoke with Mr. McCaskill in the evening on August 31, 2011, not August 30, 2011.[30]

The State attempts to argue over inconsequential details. Ms. Fonti spoke with Mr. McCaskill in the evening of August 30, 2011, and it was the early morning of August 31, 2011, that police arrested him for OWI. Mixing up dates does not demonstrate Ms. Fonti could not provide relevant details of the hours leading up to Mr. McCaskill's arrest.

In fact, Ms. Fonti testified to several details of the night of August 30, 2011 that showed she knew exactly what she was talking about. She testified Mr. McCaskill did not live in the Stevens Point area in 2011.[31] Ms. Fonti also testified that Mr. McCaskill called to inform her he was coming into Plover and might stop by her residence.[32] She testified she knew he was trying to sell his home in

[28] State Br. 11.
[29] State Br. 11; State Br. 6, n.1.
[30] State Br. 6; State Br. 11.
[31] R.19 at 5:21.
[32] R.19 at 5:16–17.

the area, and she thought that was the reason for his trip.[33] Ms. Fonti also testified Mr. McCaskill had a pint-sized margarita while at her residence.[34] She further testified that while she was upstairs with her daughter, Mr. McCaskill left the residence.[35] Early on in her testimony, Ms. Fonti stated that because she had not seen if he had driven to the house, she could not see if Mr. McCaskill had driven away that evening.[36]

Besides being important information, these details demonstrate Ms. Fonti had a cordial, longstanding acquaintance with Mr. McCaskill. This explained her willingness to attest and eventually testify to what she knew, once she learned of its significance to Mr. McCaskill's defense. Most importantly, these details demonstrate there is some question of whether Mr. McCaskill had been driving that evening. Ms. Fonti stated she did not see a car pull into her driveway.[37] Nor did she see a car drive away.[38] It is on the issue of operation that Ms. Fonti's evidence would have been fundamental.

[33] R.19 at 6:3–7.
[34] R.19 at 7:20; 23.
[35] R.19 at 8:13–17.
[36] R.19 at 8:22; 9:9.
[37] R.19 at 8:22.
[38] R.19 at 9:9.

(4) The evidence is not merely cumulative.

The State argues Ms. Fonti's testimony is first cumulative, then irrelevant.[39] Ms. Fonti's testimony was not cumulative and was very much relevant. As stated in Mr. McCaskill's brief-in-chief, the State at trial relied on circumstantial evidence of driving. As the State readily points out in its brief here, defense counsel at trial also admitted Mr. McCaskill likely drove.[40] The fact that Mr. McCaskill, after conviction, presented new, alternative evidence that refuted the State's argument on operating shows the evidence was the opposite of cumulative: It was unique. Had she testified at trial, Ms. Fonti's testimony could have acquitted Mr. McCaskill of all charges.

The trial court ruled that Mr. McCaskill had met all four prongs and that Ms. Fonti's testimony was newly discovered evidence.[41] This was not an erroneous exercise of discretion.

B. Ms. Fonti's testimony would have led to a different result at trial.

The State argues the fact Mr. McCaskill's car was found three-quarters of a mile from Ms. Fonti's residence indicates it was "quite unlikely" Mr. McCaskill walked to-and-from Ms. Fonti's home.[42] In fact, the distance makes sense. Mr. McCaskill and Ms. Fonti had dated

[39] State Br. 11.
[40] State Br. 5; R.17 at 167:25–167:1–3.
[41] R.4 at 2.
[42] State Br. 13.

at an earlier period.[43] At the time Mr. McCaskill visited Ms. Fonti at her residence in August 2011, the two had drifted apart and moved on with their lives.[44] Mr. McCaskill may not have wanted to advertise the fact he was visiting an ex-girlfriend. Given these circumstances, Mr. McCaskill parking his vehicle and then walking to Woodduck Lane made complete sense.

The State also argues it was "quite unlikely" Mr. McCaskill walked three-quarters of a mile to his rental vehicle with a .263 BAC and while wearing no shirt or shoes.[45] In fact, Mr. McCaskill behaved exactly as a person with a .263 BAC would behave. He stumbled to his vehicle, lost his shoes and shirt in the process, and then passed out in the vehicle. The location of the keys was unknown, according to testimony at trial.

Ms. Fonti's testimony would have provided a more cohesive narrative for the night of August 30, 2011, to early morning of August 31, 2011. The State argues Ms. Fonti's testimony is unimportant because it does not explain how police found Mr. McCaskill on the side of the roadway in his parked vehicle. While Ms. Fonti was only with Mr. McCaskill for a portion of the evening, given his inebriated

[43] R.18 at 8:7–8; R.19 at 10:12–13.
[44] R.19 at 10:14–18.
[45] State Br. 13.

and disoriented state when hospital staff roused him, she was the only person who could provide details of the evening.

Had she been called as a witness during the jury trial, Ms. Fonti would have testified to the following information. First, Mr. McCaskill contacted her to let her know he would be in Plover on August 30, 2011.[46] Mr. McCaskill stated he might stop by her home in the evening of August 30, 2011.[47] Next, she would have testified that on August 30, 2011, she heard from a friend that Mr. McCaskill was in town at a local bar.[48] Though he planned on arriving around 6:00 pm to Ms. Fonti's residence, Mr. McCaskill arrived shortly after 10:00 p.m. that night.[49] Once he stopped by, the two had one drink each, and Mr. McCaskill may have had more than one.[50] Shortly after, her daughter awoke and had to be tended to.[51] Once she returned downstairs, Mr. McCaskill was gone.[52] She did not notice a vehicle in the driveway at any point in the evening.[53] Nor did she speak regularly with Mr. McCaskill after his arrest to know the issue of operation was essential in his case.[54]

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[46] R.19 at 5:16–17.
[47] R.19 at 6:9.
[48] R.19 at 13:2.
[49] R:19 at 7:6–9.
[50] R.19 at 6:21; R.19 at 6:23; R.19 at 7:4.
[51] R.19 at 8:15–17.
[52] R.19 at 8:16–17.
[53] R.19 at 8:22; 9:9.
[54] R.19 at 9:20.

Though the State believes Ms. Fonti's testimony was unimportant, it does not address why Ms. Fonti's testimony would have been less important than the other testimony offered at trial. The explanation appears to be that the State does not like inferences when they favor the defense. Ms. Fonti's testimony would have allowed the jury to infer Mr. McCaskill had walked to-and-from Ms. Fonti's residence that evening. Without her testimony, the jury inferred that Mr. McCaskill drove his vehicle that evening. At the very least, Ms. Fonti's testimony would have allowed the jurors to weigh the two sets of inferences. Alternatively put, because the State at trial relied on circumstantial evidence of operation, Ms. Fonti alone could have provided details that shed doubt on the State's circumstantial evidence.

CONCLUSION

For the reasons stated in this reply brief and Mr. McCaskill's brief-in-chief, this Court should reverse the trial court's ruling denying him a new trial.

Dated at Madison, Wisconsin, May 30, 2018.

Respectfully submitted,

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CERTIFICATION

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