COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2443-CR **Cir. Ct. No. 2011CT380**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK G. MCCASKILL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: ROBERT J. SHANNON, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] McCaskill appeals a circuit court order denying his postconviction motion for a new trial based on newly discovered evidence. For the reasons discussed below, I affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

BACKGROUND

¶2 On August 31, 2011, at approximately 12:39 a.m., a police officer with the Village of Plover was dispatched to a residence in response to a call that a vehicle with its lights on had been parked on the street outside the residence for over an hour. The officer found McCaskill in the driver's seat of the vehicle. McCaskill was unconscious, was not wearing a shirt or shoes, was unresponsive to stimuli, and the officer could smell the odor of alcohol coming from the vehicle. Blood testing results indicated that McCaskill had a blood alcohol concentration of 0.263 g/100 mL.

¶3 McCaskill was convicted of operating a motor vehicle with a prohibited alcohol concentration, fourth offense. This court affirmed his conviction on appeal. *See* ***McCaskill***, No. 2015AP1487-CR, unpublished slip op. (WI App July 21, 2016).

¶4 Thereafter, McCaskill moved the circuit court for postconviction relief on the basis of newly discovered evidence. McCaskill alleged in his postconviction motion that he had no recollection of what occurred on the night of August 30, 2001, into the early hours of August 31, due to his high level of intoxication. McCaskill alleged that he had recently "reconnected" with Kimm Fonti, who lives approximately three-quarters of a mile from where McCaskill was found in his car on August 31. McCaskill alleged that after reconnecting with Fonti, he discovered that he had arrived at Fonti's residence sometime after 10:00 p.m. on August 30, that he was not intoxicated when he arrived, that he and Fonti had consumed alcoholic beverages together at her residence, and that he became intoxicated while consuming those alcoholic beverages. McCaskill alleged that he

also learned that around 11:00 p.m., Fonti went to check on her daughter and when she returned, McCaskill was gone.

¶5 Following an evidentiary hearing, the court denied McCaskill's motion. McCaskill appeals that decision.

DISCUSSION

¶6 McCaskill contends that the circuit court erred in denying his postconviction motion for a new trial based on newly discovered evidence.

¶7 "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant alleging newly discovered evidence must prove, by clear and convincing evidence, 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.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted). If the defendant establishes the four criteria, the circuit court must determine whether there is a reasonable probability that a different result would be reached on retrial. ***Id***. "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.'" ***Plude***, 310 Wis. 2d 28, ¶33 (quoted source omitted). We review a circuit court's determination that the first four factors have or have not been met for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590. Whether there is a reasonable probability that a different result would be reached is a question of law that we decide independently. *See* ***Plude***, 310 Wis. 2d 28,

¶33. In making the reasonable probability determination, a reviewing court "should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." ***Id.***, ¶33; *see also* ***State v. Brunton***, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996) (defendant must show that evidence claimed as newly discovered evidence meets each of these five criteria).

¶8 I will assume for the sake of argument that McCaskill established the first four criteria necessary to obtain a retrial based on the information he learned from Fonti. I conclude, however, that McCaskill has not shown by clear and convincing evidence that there is a reasonable probability that a different outcome would be reached on retrial.

¶9 McCaskill argues that there is a reasonable probability that a jury would have found him not guilty had the jury heard testimony from Fonti "[g]iven the lack of evidence at trial for why [he] was parked along the side of Plover Springs Drive" and the lack of direct evidence that he had operated the vehicle. He argues that Fonti's testimony would have allowed him to "better challenge the State's circumstantial evidence of driving," and it would have "provided the jury with a reasonable hypothesis on [] why [he] was found by police in his [] vehicle." I am not persuaded.

¶10 Fonti testified at the hearing that McCaskill stopped by her house at approximately 10:15 p.m. She testified that she wasn't able to say whether he was intoxicated when he arrived at her house, but that she did remember him consuming at least one pint-sized alcoholic beverage. Fonti testified that she went to check on her child at around 10:45 p.m. and that when she returned at

approximately 10:50 p.m., McCaskill was gone. She testified that she did not see McCaskill arrive in a vehicle, but that it is difficult to see cars arriving at her residence because of the way her windows are situated.

¶11 Nothing in Fonti's testimony suggests whether McCaskill had operated his vehicle. While her testimony explains what McCaskill did during the approximate hours of 10:15 p.m. and 10:50 p.m., Fonti did not testify as to what McCaskill did after he left Fonti's house or how the vehicle came to be at the location where it was observed by a witness with its lights on, three-quarters of a mile distant from Fonti's, at roughly 11:30 p.m., little more than half an hour after Fonti would have left Fonti's house. In short, Fonti's testimony provides no support for McCaskill's theory that, in that short time and while highly intoxicated, he walked, apparently barefoot, from Fonti's house to his vehicle, at which point he passed out from intoxication, with the headlights on, until he was awoken by the officer, and it fails to cast any doubt on the issue of whether he had driven or operated his vehicle. Accordingly, I agree with the circuit court that there is not a reasonable probability of a different result and, therefore, affirm the circuit court's order denying McCaskill's postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.