COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0361-CR **Cir. Ct. No. 99-CF-269**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD MODER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Moder appeals an order denying his motion to withdraw his guilty plea based on newly discovered evidence. The trial court concluded that Moder was negligent for not discovering the evidence before his plea hearing. Because Moder failed to meet the test for newly discovered

evidence and the trial court properly exercised its discretion when it denied his motion to withdraw his plea, we affirm the order.

¶2 Moder pled guilty to operating a vehicle without the owner's consent. The car was owned by his ex-wife, Cathy Roulette. Moder contends that he was a partial owner of the car because he paid $100 toward its purchase and did mechanical work on the car. At the plea hearing, the court specifically reminded Moder that his attorney could subpoena witnesses who might testify in his defense. Moder's "newly discovered evidence" consists of friends who had seen him drive the car on other occasions and who knew that he had helped Roulette purchase the vehicle and knew that he had performed repairs on it.

¶3 To justify withdrawing his guilty plea after sentencing, Moder must establish a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 249-50, 471 N.W.2d 591 (Ct. App. 1991). A manifest injustice can be established by showing newly discovered evidence if: (1) the evidence was discovered after conviction; (2) Moder 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. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (Ct. App. 1995). Newly discovered evidence does not include a new appreciation of the importance of evidence previously known but not used. *See* ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 706, 624 N.W.2d 883. This court can decide whether evidence is "newly discovered" without deference to the trial court. ***Id.*** at ¶12.

¶4 Moder's new evidence does not meet the test for newly discovered evidence because he was negligent for failing to secure his friends' testimony before he entered the guilty plea. Moder had all of the necessary information at the time he entered his guilty plea. He knew the names of these witnesses and

appreciated the significance of their knowledge about the car before he pled guilty. His only excuse for not seeking their testimony before his plea hearing was that he was incarcerated and did not have access to a telephone book. Moder was represented by counsel who, with minimal investigation, could have located these witnesses. At the postconviction hearing, Moder testified that he decided to wait for an appellate attorney to try to locate somebody to back up his side of the story. Moder's failure to secure his friends' testimony before his plea hearing was due to his negligence in not submitting the names to his trial attorney. Because Moder did not present newly discovered evidence, the trial court properly exercised its discretion when it refused to allow him to withdraw his guilty plea.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.