

FILED
06-28-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Case No. 2019AP001996-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALIJOUWON T. WATKINS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-
Petitioner

ISSUE PRESENTED

Whether a court may order a new trial based on “newly discovered evidence” when the evidence did not exist at the time of trial.

How the lower courts ruled: The court of appeals created a new bright line rule for newly discovered evidence, holding *sua sponte* that evidence cannot be considered “newly discovered” if the evidence is of something that “simply happened after trial.” (Opinion, ¶ 50). The court of appeals upheld the circuit court’s denial of a postconviction motion based on newly discovered evidence.

TABLE OF CONTENTS

	Page
Issue Presented.....	i
Reasons for Granting Review.....	1
Statement of The Case	2
Argument.....	4
I. Review is warranted to address the new rule announced below that limits “newly discovered evidence” to evidence that existed at the time of trial.....	4
A. Legal Standards	4
B. The Court of Appeals rule limiting “newly discovered evidence” to evidence that existed at the time of trial is unnecessary.....	6
C. The new rule announced by the court of appeals is difficult to apply in practice, because it is unclear what is an “existing fact” and what is “evidence” of that fact.....	8
II. Review is warranted because Watkins is entitled to a new trial based on newly discovered evidence.....	11
A. The evidence was discovered after conviction.	11
B. Watkins was not negligent in seeking the evidence.....	11

C. The evidence was material to an issue in the case: James’s credibility..... 11

D. The evidence was not cumulative..... 12

E. There is a “reasonable probability” that a jury hearing the evidence that James was impersonating an officer would have reasonable doubt of Watkins’s guilt..... 16

Conclusion 18

Index to Appendix..... 100

REASONS FOR GRANTING REVIEW

The Petitioner, Alijouwon T. Watkins, argued below that a critical witness's post-trial statements and conduct revealed a new motivation for the witness to fabricate the allegations against Watkins. In an opinion recommended for publication, the court of appeals held that Watkins was not entitled to relief due to a new bright-line rule for newly discovered evidence that the court issued *sua sponte*: the evidence must be "of a fact that was true at or before the time of trial," and that the evidence cannot be of something that "simply happened after trial." (Opinion at ¶¶ 48, 50; App. 119-121).

The new rule is unnecessary because it is subsumed by the existing "materiality" and "reasonable probability" requirements for a new trial based on newly discovered evidence. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52. For instance, if a witness's post-trial statements and conduct truly have no bearing on the witness's credibility at the time of trial, then they are not "material" and thus not "newly discovered evidence." *Id.* And if such post-trial statements and conduct do have some bearing on credibility, but only a trivial amount due to the passage of time or any other factor, then there is not "a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *State v. McAlister*, 2018 WI 34, ¶ 32, 380 Wis. 2d 684, 911 N.W.2d 77.

In addition, the court's new rule is difficult to apply. The court inconsistently suggests at one point that only the "fact" proven by the new evidence must exist at the time of trial, but later indicates that the "evidence" of the fact must also exist at the time of trial. (Opinion at ¶¶ 48, 50; App. 119-121). Indeed, the court rejected Watkins's newly discovered evidence even though they were relevant to the witness's motivations at the time of trial, seemingly a "fact" that existed at the time of trial. (Opinion at ¶¶ 48, 50; App. 119-121).

However, as is often the case, newly discovered evidence does not exist until well after trial, such as when a witness recants, or advances in technology allow for more sophisticated testing of physical evidence. The lower court's new rule thus has the potential to prevent the consideration of legitimate newly discovered evidence.

The well-established test for newly-discovered evidence is flexible enough to consider all the factors necessary to decide whether a new trial is necessary to avoid a "manifest injustice." Review should be granted to reject the modification of this test by the court of appeals.

STATEMENT OF THE CASE

The trial in this case involved three separate incidents: (1) an alleged altercation between the defendant, Alijouwon T. Watkins, and his girlfriend; (2) an alleged altercation between Watkins and two police officers; and (3) an alleged conspiracy between

Watkins and a jailmate, Damian James, to pay a sniper \$30 to assassinate one of the arresting officers. (R. 1, 184).

The \$30 figure came from a recorded jail phone call in which Watkins agreed to pay someone \$30 to fix his car. According to James, and James alone, this was code for a “hit” on the arresting officer. (R.176:201-207; 177:35). James was an experienced jailhouse snitch, who knew that setting up Watkins for additional charges would get him out of jail early. (R.176:140-141). In addition, James enjoyed telling tall tales about himself, lying to Watkins and others at the jail about being a member of the Italian Mafia, the Latin Kings street gang, and the United States Marine Corps. (R.176:138). At trial James explained away these lies with the observation that “everyone in jail has a story.” (R.176:233).

The assault and conspiracy-related allegations were charged in two separate criminal cases against Watkins. Two weeks before trial, the circuit court granted the State’s motion to join the two cases, encompassing 11 separate charges, for trial. (R. 172, 183; App. 114-122). At trial, Watkins was convicted of some, but not all the counts.

James’s fantastical bent took on a different character after he was released from jail for assisting in Watkins’s prosecution. Twice after Watkins’s trial, James was arrested and convicted for impersonating a police officer, replete with a fake badge and gun.

(R. 136, 144). In one episode, James's fake identity was part of a ploy to defraud a bank.

Watkins filed a motion for post-conviction relief, arguing that joinder was improper and that he was entitled to a new trial based on the newly discovered evidence of James's postconviction statement and conduct. The circuit court denied the motion, and Watkins appealed. The court of appeals affirmed the circuit court in a decision dated May 27, 2021.

ARGUMENT

I. Review is warranted to address the new rule announced below that limits “newly discovered evidence” to evidence that existed at the time of trial.

A. Legal Standards

Wisconsin courts have long had the power to order a new trial based on “newly discovered evidence,” as a way of avoiding the “manifest injustice” of convicting an innocent person. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52; *Wilson v. Plank*, 41 Wis. 94, 96 (1876). Countless convictions have been reversed across the country due to new scientific testing techniques and witness recantations.

The formal requirements for a new trial based on the discovery of new evidence are thus well-established:

When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: (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. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

Plude, 2008 WI 58, ¶ 32 (citation and quotation marks omitted). “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.” *Id.* at ¶ 31.

Importantly, the courts apply these criteria regardless of whether the new evidence may be considered “substantive” or “impeaching” in nature. “Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial.” *Plude*, 2008 WI 58, ¶ 47. “It may well be that newly discovered evidence, impeaching in character, might be produced so strong as to constitute ground for a new trial, as for example where it is shown that the verdict is based upon perjured evidence.” *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W. 274, 275 (1913). Thus, in *Plude*, the defendant was awarded a new trial not because of the discovery of new evidence contradicting the substance of an expert witness's opinions, but because of new evidence that the

witness had lied about his credentials. 2008 WI 58, ¶ 50.

- B. The Court of Appeals rule limiting “newly discovered evidence” to evidence that existed at the time of trial is unnecessary.

The court of appeals declared that in order to be considered “newly discovered evidence,” “the proffered evidence [must be] of a fact that was true at or before the time of trial.” (Opinion at ¶ 48; App. 119). The court similarly modified the first step in test, that “the evidence [be] discovered after conviction,” to hold that the evidence must exist at the time of trial and cannot be something that “simply happened after trial.” (Opinion at ¶ 50; App. 121).

The court’s apparent concern was that post-trial events unconnected to the trial itself may be used to argue for a new trial. However, this concern is addressed by the “materiality” and “reasonable probability” steps in the newly discovered evidence test. First, if post-trial statements or conduct are truly not probative of a witness’s credibility on the stand, then the evidence is not “material to an issue in the case” and a new trial should not be ordered. *Plude*, 2008 WI 58, ¶ 32.

For instance, suppose the proposed newly discovered evidence is that a witness and the victim have a business relationship, and that the witness is thus biased in favor of the victim. If the business

relationship arose after the trial, then it would not have affected the witness's biases at the time of trial, and thus would not be "material to an issue in the case," *i.e.* the witness's credibility.

Second, if post-trial statements or conduct have some bearing on credibility at the time of trial, but are so tenuous as to not create a "reasonable probability" of a different outcome, then, again, a new trial should not be ordered. *Plude*, 2008 WI 58, ¶ 32. For instance, suppose the defendant discovers that five years after trial a witness lied on a job application or was convicted of a misdemeanor, and thus has a character for untrustworthiness. A defendant might get past the materiality step by arguing that the evidence shows the witness *always* had an untrustworthy character, including at the time of trial. However, given the amount of time that passed and the low probative value it has of the witness's character for trustworthiness, it is likely the evidence would not create a reasonable probability of a different outcome at trial.

However, there clearly are circumstances where a witness's post-trial statements and conduct can create such a doubt about the witness's credibility at trial that a new trial is necessary to avoid a manifest injustice. For instance, a New York City detective investigated for framing multiple innocent people was famously found to have suspiciously used the same witness to "solve" five totally unrelated murders, suggesting that there was

some undisclosed arrangement between the two.¹ Clearly, the first defendant convicted as a result of such an arrangement should be able to point to the subsequent evidence of the arrangement, even though the evidence did not exist at the time of trial. And the existing newly discovered evidence framework is rightly flexible enough to consider this scenario, as the court will consider the probity of the post-trial conduct on credibility and the probability of a different result. On the other hand, under the rule announced by the Court of Appeals, the defendant could not rely on such evidence because it occurred post-trial.

- C. The new rule announced by the court of appeals is difficult to apply in practice, because it is unclear what is an “existing fact” and what is “evidence” of that fact.

In addition to being unnecessary, the new rule is difficult to apply in practice. It is unclear what is a “fact that exists at the time of trial” and what is “evidence” of that fact, and whether it is the “fact,” the “evidence,” or both, that needs to exist at the time of trial. (Opinion at ¶¶ 48, 50; App. 119-121).

The court initially states that to be newly discovered evidence, the proffered evidence must be “of a fact that was true at or before the time of trial.” (Opinion at ¶ 48; App. 119). This suggests that the

¹https://en.wikipedia.org/wiki/Louis_N._Scarcella#Use_of_Teresa_Gomez

evidence can come into being after trial, so long as the fact it relates to existed at the time of trial. However, the court later contradicts this notion, by saying that evidence cannot meet the first step in the test – that “the evidence was discovered after conviction” – if the evidence was not “discovered” by the time of trial because it did not exist and instead “simply happened after trial.” (Opinion at ¶ 50; App. 121).

However, “newly discovered evidence” is often “discovered” after trial because the evidence did not exist until after trial. For instance, witness recantations are considered newly “discovered” even though they did not exist at the time of trial (or a plea). *See, e.g., State v. McCallum*, 208 Wis. 2d 463, 469, 561 N.W.2d 707, 709 (1997). Similarly, advances in technology can result in evidence in the form of DNA tests that did not exist at the time of trial. Thus, there should be no requirement that the evidence exist at the time of trial in order to be considered “newly discovered.”

In addition, the outcome of the lower court’s new rule will turn on how the court defines a “fact” versus “evidence.” For instance, Watkins argued that James’s post-trial statements and conduct – specifically, James repeatedly impersonating a police officer, leading to multiple arrests and convictions – demonstrated a previously unknown motivation to fabricate the allegations against Watkins: a bizarre obsession with falsely appearing to be a member of law enforcement. Watkins thus argued that the new

evidence concerned a “fact that exist[ed] at the time of trial”: Watkins’s state of mind – his motivations, biases, etc. – at the time of trial.

Instead, the court of appeals more narrowly defined the “fact” that Watkins was attempting to prove as James’s post-trial arrests. (Opinion at ¶ 51; App. 122). And because these “facts” – the arrests – occurred post-trial, the court concluded that they could not be considered “newly discovered evidence.” *Id.* At no point did the court address Watkins’s contention that the conduct underlying the arrests was relevant to James’s motivations at the time he was testifying. (*See, e.g.*, Watkins Br. at 24).

Finally, it should be noted that the failure of the court of appeals to address Watkins’s actual argument may be the result of the court announcing and applying this new rule *sua sponte*. The State did not advocate for this rule in its response to Watkins’s brief. Indeed, the state conceded that Watkins met the first three steps of the newly discovered evidence test. The State instead argued that the evidence was “cumulative,” and that there was not a reasonable probability of a different outcome. (State Br. at 10-17). Accordingly, Watkins did not have an opportunity to address this rule until after the court of appeals issued its decision below. Accordingly, review is warranted.

II. Review is warranted because Watkins is entitled to a new trial based on newly discovered evidence.

Watkins is entitled to a new trial when the correct newly discovered evidence test is applied. *State v. Plude*, 2008 WI 58, ¶ 32.

A. The evidence was discovered after conviction.

James's multiple instances of impersonating a police officer, as well as his arrests and convictions for this conduct, occurred after Watkins's trial. They were thus "discovered" after Watkins's convictions. Wis. Stat. § 972.13. The State conceded below that this first criterion for *Plude* was met.

B. Watkins was not negligent in seeking the evidence.

Watkins similarly could not be "negligent" for seeking James's convictions, because they did not occur until after Watkins is trial. Again, the State properly conceded that the second *Plude* was met.

C. The evidence was material to an issue in the case: James's credibility.

The State had no case without James. If James did not testify, the only evidence supporting a conspiracy charge against Watkins would have been recorded phone calls where Watkins (1) expressed anger at his arresting officer, and (2) hired the undercover ATF agent to fix his car. Indeed, if that

was the only evidence put on by the State, Watkins would have been entitled to a directed verdict at the end of the State's case.

James's testimony, and thus his credibility, was absolutely essential to the State's case. In order to convict Watkins for the "conspiracy" to kill E.M. – *i.e.*, that Watkins believed there was an agreement between himself and the ATF agent to assassinate E.M. – and to convict Watkins for "intimidation," the jury had to believe James's testimony that they had set up a code where "fixing a car" meant murdering a police officer, not actually fixing a car. (R. 176:201-207). To prove that Watkins had solicited James to kill E.M. in one of the notes James gave to the authorities, the jury had to believe James's testimony that Watkins gave him the note. (R. 176:124-129).

The State and the circuit court were thus correct in their conclusion that James's credibility was material to the State's case, the third factor under *Plude*.

D. The evidence was not cumulative.

Next, the "evidence is not merely cumulative." *Plude*, ¶ 32. "[E]vidence is cumulative where it tends to address 'a fact *established* by existing evidence.'" *State v. McAlister*, 2018 WI 34, ¶ 37, 380 Wis. 2d 684, 707, 911 N.W.2d 77, 88 (*quoting State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305) (emphasis supplied). Simply attacking a witness's credibility will not "establish" the "fact" that the witness was lying on the stand, and thus will not

make all additional impeachment evidence “cumulative.” *Thiel*, 2003 WI 111, ¶¶ 78-80. On the other hand, impeachment evidence may be cumulative if it only tends to prove a specific reason for disbelieving the witness that was already established at trial. *McAlister*, 2018 WI 34, ¶ 37.

As in *Thiel* and *McAlister*, while James’s credibility was attacked at trial, it was not “established” that he was in fact lying during his testimony against Watkins. If it had been, Watkins would have been acquitted. As noted above, James was essential to explaining that when Watkins hired the agent to fix his car, he was speaking in code and actually conspiring to commit first-degree homicide.

And although Watkins attacked James’s credibility, his attacks did not “establish” any of the facts that make the newly discovered police impersonations powerful impeachment evidence. Watkins pointed out James’s prior convictions, his belief that assisting law enforcement would help get him out of jail faster, and his false boasts of being in the military and the Italian mafia. Clearly, James impersonating a police officer is not cumulative to his prior convictions or his belief that he would get out of jail sooner by giving testimony against Watkins.

Impersonating a police officer carries a tremendous amount of risk. Unlike making up stories about one’s past, going out into the wild and impersonating a police officer carries significant criminal penalties. Wis. Stat. § 946.70(1)(a). This

shows a greater toleration of risk in the service of a lie than any other impeachment evidence at trial.

In addition, James took great care to plan out his schemes to impersonate a police officer. In the Madison case, James obtained a fake badge and an airgun to carry out his ruse. (R. 136:12). In the Milwaukee case, James's impersonation of a police officer was part of a scheme to defraud money from a bank. (R. 144:3-4).

These incidents thus demonstrate that James has a willingness -- a proclivity, even -- as well as the ability to come up with elaborate cons in order to get what he wants. A jury hearing that James puffed himself up in jail might not think that means he would also risk criminal charges by falsely claiming that Watkins solicited him to murder a police officer. It would be a different matter if the jury heard that James was brazen enough to twice claim that he was a police officer, replete with fake badge and gun, and in an effort to defraud a bank.

In addition, the new evidence suggests a motive or bias to testify against Watkins and for the State that was not raised at trial: a bizarre fixation on being seen as a member of law enforcement. "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Wis. Stat. § 906.16. Just like the firefighter who

secretly commits arson to be hailed a hero,² these episodes suggest that James has the wherewithal to concoct a plot where he heroically saves E.M. from Watkins's efforts to solicit her murder.

In the Madison case, James carried out his ruse for weeks before being caught, repeatedly going into a convenience store and claiming he was a Madison police officer. At one point, he claimed he had to leave to go on a "call" involving a suicidal woman. (R. 136:10). In the Milwaukee case, James falsely claimed to be part of the detail that escorted the body of a police officer shot and killed in the line of duty. (R. 144:3-4).

Moreover, these recent episodes shed new light on James's two prior convictions for impersonating a police officer in 1999 and 2001. (R. 176:153-154). While those prior instances were on their own too remote in time to suggest any kind of fixation on being seen as a police officer, when they are considered in conjunction with his recent efforts it appears that there is a deep-seated obsession with being perceived as a police officer.

James was able to act out his fantasy of being in law enforcement by "assisting" real law enforcement officers in building a case against Watkins. He had numerous conversations with the investigating officers on how to gather evidence against Watkins, suggested that they use "fixing a

² https://en.wikipedia.org/wiki/Firefighter_arson

car” as code for hiring a “hit,” and even got to wear a wire like he was an undercover agent.

A jury could reasonably conclude that it was not mere coincidence that a person who clearly is obsessed with appearing to be a police officer found himself in a position where he could act like a police officer in order to save a police officer. A jury could quite easily conclude that James dreamed up the entire story as a scheme to live out his fantasies. Thus, this is impeachment evidence of a different kind than what was introduced at trial, and thus not “cumulative” under *McAlister*.

- E. There is a “reasonable probability” that a jury hearing the evidence that James was impersonating an officer would have reasonable doubt of Watkins’s guilt.

Once a defendant establishes the four *Plude* criteria, the court must “determine[] whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.” *Plude*, 2008 WI 58, ¶ 32. “A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt.” *McAlister*, 2018 WI 34, ¶ 32.

As discussed above, James’s credibility was critical to the State’s case. James’s testimony was necessary to decipher the supposedly coded talk between Watkins and the ATF agent. James is the

one who explained that when Watkins was agreeing to pay \$30 to have the agent fix his car, Watkins was actually hiring the ATF agent to kill E.M. (R. 176:201-207). James was also needed to authenticate Watkins as the author of the various notes introduced at trial. (R. 176:124-129). James was similarly necessary to give context and explain his recorded conversations with Watkins.

And although there was some evidence impeaching James's credibility, there is a reasonable probability that additional evidence of his untrustworthiness would have tipped the scales in Watkins's favor. As discussed above, it would be reasonable for a jury to conclude that impersonating a police officer outside of jail was of a different character than his stories in jail, and that he simply cannot be believed. It would likewise be reasonable for a jury to conclude that the episodes demonstrate a willingness to lie to appear the hero, and that James concocted the entire scheme to fulfill his bizarre fantasy to appear to be in law enforcement.

CONCLUSION

For the reasons stated above, the court should grant the petition to review.

Dated this 28th day of June, 2021.

Respectfully submitted,

Thomas B. Aquino
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-
Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,938 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 28th day of June, 2021.

Signed:

Thomas B. Aquino
Assistant State Public Defender

A P P E N D I X

INDEX TO APPENDIX

	Page
Court of Appeals decision	App. 101
October 3, 2019 Decision and Order (R. 145)	App. 124
April 19, 2019 Final Pretrial Conference Excerpt (R.172)	App. 137