COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1090-CR **Cir. Ct. No. 00-CF-153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOUIS RAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Louis Ray appeals a judgment convicting him of conspiracy to deliver five to fifteen grams of cocaine, as a second or subsequent drug offense, and an order denying his amended postconviction motion for a new

trial.[1] Ray claims that he is entitled to a new trial based on newly discovered evidence or in the interest of justice because the prosecutor helped a witness against Ray to terminate his parole after the trial. For the reasons discussed below, we disagree and affirm.

BACKGROUND

¶2 Eldioju Reynolds was a key witness against Ray at trial. While on parole, Reynolds had volunteered to act as an informant for the police. Reynolds was working for the police in an undercover capacity when he first met Ray.

¶3 Reynolds testified that Ray told him he was working for a drug dealer, and that he needed a scale in order to obtain more drugs. After Reynolds overheard Ray tell an undercover agent over the phone that he would sell him drugs, Reynolds obtained a scale from the agent. Ray and Reynolds drove to a motel where a man named Frank gave Ray cocaine to sell. Ray was arrested on the drive home.

¶4 The officer testified that the voice of the man he spoke to over the phone was similar to Ray's voice. He confirmed that Reynolds asked him to get a scale for Ray and that he followed Ray and Reynolds to the motel. Another officer added that police had arrested other occupants of the motel shortly thereafter and found crack cocaine.

[1] There was a companion judgment convicting Ray of resisting or obstructing an officer, as an habitual offender, which is not at issue on this appeal.

¶5 The State pointed out in closing argument that Reynolds was an atypical informant because he had come forward without seeking consideration on pending charges. The jury returned a guilty verdict.

¶6 After sentencing, Ray learned that the prosecutor had asked Reynolds after he testified what he would be doing next. When Reynolds informed the prosecutor that his request to have his parole transferred to Minnesota had been denied, the prosecutor helped Reynolds obtain an early termination of his parole.

DISCUSSION

¶7 Ray contends that the trial court misapplied the newly-discovered-evidence test to determine whether he was entitled to a new trial, and that the denial of a new trial deprived him of due process. In the alternative, he claims he should be granted a new trial in the interest of justice.

¶8 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). The defendant must prove all five requirements by clear and convincing evidence. *See* ***State v. Avery***, 213 Wis. 2d 228, 235, 570 N.W.2d 573 (Ct. App. 1997). Because a motion for a new trial is addressed to the sound discretion of the trial court, we will not disturb the trial court's evaluation of the relevant factors unless it failed to

rationally apply the proper legal standard to the facts of record. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

¶9 We may independently determine, however, whether the absence of certain evidence from trial deprived the defendant of due process in the sense that the defendant was "completely" prohibited from exposing a witness's bias or motive for testifying falsely, or was deprived of material evidence so favorable to his defense as to "necessarily" prevent him from having a fair trial. *See* ***Coogan***, 154 Wis. 2d at 394-95; ***United States v. Manske***, 186 F.3d 770, 778-79 (7th Cir. 1999); *see also* ***United States v. Valenzuela-Bernal***, 458 U.S. 858 (1982).

¶10 Ray argues that the trial court acted under an erroneous view of the law by following a line of Wisconsin cases which state that newly discovered evidence which serves only to impeach the credibility of witnesses who testified at trial is insufficient to warrant a new trial. *See, e.g.,* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972) and ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). Ray asserts that statements such as those made in ***Simons*** and ***Kimpel*** conflict with federal cases which hold that impeachment evidence may be sufficient to warrant a new trial when the witness testimony to be impeached was uncorroborated and provided the only evidence of an essential element of the government's case. Therefore, Ray reasons, such statements cannot be an accurate statement of the law in Wisconsin.

¶11 We conclude, however, that we need not address whether the federal authorities Ray cites are inconsistent with Wisconsin precedent on the question of whether newly-discovered impeachment evidence may be sufficient, in and of itself, to warrant a new trial. We are satisfied that the information at issue here cannot properly be characterized as newly-discovered impeachment evidence.

¶12 There is no indication in the record that, at the time he testified, Reynolds had either asked for or been promised any consideration in exchange for his testimony. Therefore, if Reynolds was in any way motivated by a *hope* that the prosecutor would help him transfer or terminate his parole if he cooperated, that hope was based on the mere fact that he was on parole, which was readily ascertainable prior to trial. The fact that Reynolds hoped for some assistance at the time he testified, if it is indeed a fact, could have been discovered at or before trial. Moreover, Ray was not prevented from exploring whether Reynolds had an ulterior motive for his testimony. As we have noted, Ray could have cross-examined Reynolds about whether he hoped for assistance from the State in transferring or terminating his parole.

¶13 Finally, for similar reasons, we are not persuaded that the interest of justice requires a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).