

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIK PERRIGAN,

Defendant-Appellee.

UNPUBLISHED

April 22, 2004

No. 243656

Wayne Circuit Court

LC No. 00-008145

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

MEMORANDUM.

Plaintiff appeals the circuit court order granting defendant's motion for new trial based on newly discovered evidence. In an October 17, 2002 order, we peremptorily reversed the trial court's ruling. This case is now before us on remand from the Supreme Court for plenary consideration in light of *People v Cress*, 468 Mich 678; 663 NW2d 174 (2003). Again, we reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review for an abuse of discretion the trial court's decision to grant defendant a new trial, while its factual findings are reviewed for clear error. *Cress, supra* at 691. In *Cress*, the defendant was convicted of first-degree felony murder. Twelve years after the conviction, defendant moved for a new trial, asserting that an Arkansas prison inmate had admitted killing the victim and presented his confession. *Id.* at 682. The trial court granted the defendant a new trial, but vacated that decision when the prosecutor presented evidence that brought the confession into question. *Id.* at 683, 686. This Court reversed. *Id.* at 690.

The Supreme Court noted that for a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Id.* at 692. In reinstating the trial court's denial of the defendant's motion for new trial, the Court emphasized that "[a] mere difference in judicial opinion does not establish an abuse of discretion." *Id.* at 691. "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Id.* at 692.

The newly discovered evidence proffered by defendant is the alleged confession of Douglas Binder. Defendant presented the affidavits of two defense investigators who stated that Binder confessed that he was the driver of the vehicle. Defendant also presented polygraph examination results of defendant and another witness, Clyde Smith, which indicated that they were not being deceptive when they stated that defendant was not the driver. In response, the prosecution presented Binder's affidavit in which he denied being the driver and denied making such a confession to defense investigators. The trial court granted defendant's motion because it believed that there was an "indication" that defendant may have been wrongly accused and that justice dictated that the motion be granted. Therefore, it appears the court gave credence to Binder's confession to defense investigators that he was the driver of the vehicle as supported by the affidavits and polygraph examination results. Inherent in the court's ruling was a finding that a different result would be probable at retrial. For the following reasons, we find that the trial court abused its discretion in granting defendant a new trial.

The record is unclear as to when defendant was aware that Smith was going to recant his original statement that defendant was the driver of the vehicle. And so we cannot comment as to whether this "newly discovered evidence" could have been discovered with reasonable diligence before trial. But it is clear that this evidence is purely cumulative because both defendant and Smith testified at trial that defendant was not the driver. And although at trial Smith did not identify Binder specifically, he did testify that his brother-in-law was the driver.

If granted a new trial, Binder would testify that he was not the driver and would also deny that he made a confession to defense investigators. The confession itself would be inadmissible because it is hearsay. Defendant contends that the confession would be admissible under MRE 804(b)(3) or MRE 804(7). However, there is no evidence that Binder would be unavailable for trial as required by MRE 804 to admit hearsay under either of these exceptions. Additionally, given Binder's statement to the prosecution and Smith's contradictory statements before and during trial as to the identity of the driver, the confession lacks sufficient indicia of trustworthiness which is also required for hearsay to be admitted under either of these exceptions. Thus, defendant would only be able to impeach Binder with the statement. Consequently, it cannot be found that the newly discovered evidence, i.e., Binder's confession, would make a different result probable on retrial.

Reversed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski