IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed January 28, 1977
vs.	)	
THOMAS A. FENNELLY,	)	20 59502
Appellant.	)	

Appeal from Scott District Court - Lowell D. Phelps, Judge

Appeal from judgment of conviction of larceny and denial of motion for new trial. - Affirmed.

Vincent R. Petrucelli of Carlin and Darbyshire, P.C. of Davenport, Iowa for appellant.

Richard C. Turner, Attorney General, Ray W. Sullins, Assistant Attorney General, and A. Fred Burger, Assistant Scott County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, J.J.

FILED
JAN 28 1977
CLERK SUPREME COURT

SNELL, J.

On the night of July 16, 1975, Vern Gagne was in Davenport, Iowa, to defend his title as world heavyweight professional wrestling champion. His opponent was Nick Bokwinkle. At that time Vern Gagne possessed the world heavyweight championship belt which was to go to the winner of the match. Prior to the match, Gagne handed the belt to the timekeeper for safekeeping. Gagne was successful in his title match. At the conclusion of the match, the timekeeper handed the belt to the referee. Before Gagne could regain physical possession of the belt, however, a new and unsanctioned wrestling match developed involving Gagne and Bokwinkle. The referee threw the belt back to the timekeeper. At the same time, spectators rushed toward the wrestling ring, adding to the confusion. One of the spectators grabbed the belt from the timekeeper and ran away with it.

Thomas Anthony Fennelly, the defendant, was subsequently charged, tried by jury and convicted of stealing the belt in violation of Section 709.1, The Code.

The trial court instructed the jury that it could, if the evidence warranted, find the defendant guilty of the included offense of larceny of $20 or less. The jury found defendant guilty of larceny of property having a value in excess of $20.

The belt was not recovered at the time of trial. After trial, and on the day scheduled for sentencing, the belt was received by the Davenport Police Department in the mail. On that day, defendant's attorney requested and received a continuance in order to prepare and file post trial motions. The motion filed, which is before this court for review, was for a new trial based on the newly discovered evidence; i.e., the belt and its value as pertained to defendant's conviction. The trial court denied defendant's motion for new trial. We affirm.

Evidence was introduced at trial by the State that the

value of the belt was in excess of $20. Walter Carbo, Vern Gagne's promoter since 1949, testified that the belt was made of silver and gold plated vermeil and that it contained eight diamonds. The diamonds were three-quarter carat each and surrounded a symbol of an eagle in the buckle. A Davenport jeweler for 25 years, relying on this description and a picture of the belt, stated that any three-quarter carat diamond would be worth a minimum of a hundred dollars. A single fine three-quarter carat diamond could be worth $2000. At a minimum, then, the eight diamonds would be worth $800. The jeweler further testified that the composition of the rest of the belt could increase the value, if it were made of precious metal. He could not conceive of any conditions which would make the belt worth less than $20.

Defendant concedes on appeal that the trial record is devoid of reversible error. He acknowledges that the proper rules of evidence were used to establish the value of the belt. The question now raised by defendant, however, is whether defendant is entitled to a new trial based on the receipt by the Davenport Police Department of the belt after the trial. Defendant claims that this is newly discovered evidence that is so material as to require a new trial.

A motion for new trial on the ground of newly discovered evidence goes to the statutory ground of whether there was a fair and impartial trial. Section 787.3(8), The Code. The general principles applicable to a motion for new trial in a criminal case based on a claim of newly discovered evidence are set forth in State v. Compiano, 261 Iowa 509, 154 N.W.2d 845 (1967). Before an applicant's motion is sustained, the defendant must show (1) the evidence was discovered after trial and before judgment; (2) it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not

merely cumulative or impeaching and (4) it would probably change the result if a new trial is granted. Defendant's motion fails to satisfy the requirements of (2) and (4).

Defendant's motion for trial is bolstered by an application for protective order and an affidavit by defendant's trial counsel. In the affidavit, counsel stated that he learned through a newspaper article on January 21, 1976, that the Davenport Police Department had possession of the belt. He went to the police station, inspected the belt and stated that it appeared to be "a bauble of little, if any, value;" that there were no diamonds or precious stones in the face of the belt; that the stones set in the face of the belt are obviously glass and that in a new trial the belt would be an important matter of defense on the question of value.

Defendant relies on State v. Foster, 37 Iowa 404 (1873), in which a new trial was granted after a stolen watch was recovered. At trial the watch was valued at $95. After trial, affidavits of witnesses were presented that the value was $10 or $15. The supreme court noted defendant's affidavit and that of his counsel showed they were not in possession at the time of the trial of the names of any witnesses by whom the evidence on the part of the State as to the value and character of the property could have been contradicted. The case is distinguishable on this point.

In *Foster*, defendant was not able at the time of trial to present evidence as to the value of the stolen property. Such is not the case here. Vern Gagne's world heavyweight wrestling championship belt was of considerable notoriety. He received it in 1952. The stolen object having been in existence for a considerable period and of some reknown, was of such nature that its value could have been presented in evidence by defendant

at the trial. We believe that witnesses could have been found by defendant to present evidence as to the value of the belt. Moreover, cross-examination of the State's witnesses on the question of value could have been made by defendant.

The evidence that was material to the offense charged is the value of the belt, not the belt itself. Evidence of value was available at time of trial. Defendant is not called upon to prove that he sought evidence where he had no reason to apprehend its existence. He must, however, exhaust the probable sources of information concerning his case. He must use that of which he knows and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed. State v. Compiano, 261 Iowa 509, 519, 154 N.W.2d 845 (1967). Newly discovered evidence is other than that which might have been known before the termination of a trial had due diligence been used. State v. Compiano, supra p. 518. Defendant failed to satisfy the second requirement that is necessary for the granting of a new trial.

Motions for new trial on the basis of newly discovered evidence are not favored; should be closely scrutinized and granted sparingly. In passing on the motion, a trial judge is vested with wide discretion. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

The only evidence regarding value of the belt presented to the trial court on the motion for new trial is the affidavit of defendant's trial counsel. That affidavit contains no statement as to monetary value of the belt, nor is any other evidence in the record in support of the motion to show that the belt was worth $20 or less when stolen.

It is the value of the belt at the time of the theft that is crucial to the question raised by the motion. No evidence is

presented as to its condition then as opposed to its present condition. The necessary support for the motion for new trial is therefore absent.

The trial jury received an instruction on the lesser included offense and, nevertheless, convicted defendant of the greater offense. There is insufficient evidence that the result would probably change if a new trial was granted. See State v. Farley, 226 N.W.2d 1, 4 (Iowa 1975).

No abuse of trial court's discretion in overruling the motion for new trial is shown. See State v. Kramer, 231 N.W.2d 874, 882 (Iowa 1975). Judgment affirmed.

All judges concur except Donielson, J., who concurs specially.

Donielson, J. (concurring specially)

I agree with the result but hasten to add that the defendant's trial counsel (not appellant's present counsel) might well have subpoenaed the belt in question for the hearing or taken witnesses to the police station to view the belt, which could have added at least some circumstantial or inferential weight to his allegations in the motion for a new trial. Noting, however, as the majority points out, it is the value of the belt at the time of the theft that is crucial. The criteria established as to value is set forth in State v. Hardesty, 261 Iowa 382, at 391, 153 N.W. 2d 464, (1967), was quite proper.

> "In these cases the rule was recognized that the general market value of stolen property is to govern in determining the value in cases of larceny, yet when the property has no general market value, other testimony by persons familiar with the property and its condition qualified to express an opinion can be received to aid the jury in establishing its true value."

Under this record, the trial court was unquestionably correct in his ruling.