FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed September 24, 1985 383 |
| vs. | ) | |
| **RICKY LEE GOODNIGHT,** | ) | 5-346 / 84-1816 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Montgomery County - Keith E. Burgett, Judge.

Defendant appeals from his conviction of distributing a simulated controlled substance to a minor in violation of Iowa Code section 204.406(2). **AFFIRMED.**

Gary K. Anderson of Anderson & Wheeler, Council Bluffs, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

**HAYDEN, J.**

Defendant appeals from his conviction of distributing a simulated controlled substance to a minor in violation of Iowa Code section 204.406(2). He asserts that the trial court erred in overruling his motion for new trial based upon newly discovered evidence. We affirm.

Ricky Lee Goodnight was charged by information with distributing a simulated controlled substance to a minor. He waived his right to a jury trial and trial proceeded before the court.

At trial, defendant's fifteen-year-old nephew, Kevin Smith, testified that while he and one Ron Updegrove were at defendant's home, defendant showed them a bag of blue capsules. Smith stated that Goodnight induced them to sell the pills at school. Smith admitted he had lied when first confronted by the school principal and originally did not implicate the defendant. Ron Updegrove, a school friend of Smith's, also testified that defendant told the boys to sell the pills to other students at school.

Goodnight, his father, and girlfriend, testified for the defense. Goodnight claimed the pills belonged to a fellow worker and that he did not solicit the boys. Defendant further testified that the boys had an opportunity to steal the pills while at his home. Testimony by other defense witnesses essentially supported the theory that Smith and Updegrove stole the pills and blamed the defendant when they were caught.

Based on this evidence, the trial court concluded that defendant was guilty as charged.

Goodnight subsequently filed a motion for new trial based on newly discovered evidence. The motion states that a new witness would testify that Updegrove attempted to sell pills which he claimed were stolen. The motion

also states that two minors would testify that Updegrove stated he stole the pills from the defendant.

At the sentencing proceeding, the court overuled defendant's motion for a new trial. Defendant has appealed.

> 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 the trial judge is vested with wide discretion.

State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975). In order to prevail, 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 of the trial.

Without unnecessarily extending this opinion, we conclude that defendant's motion for a new trial was properly overruled. It is apparent to this court that the new evidence was cumulative in nature and would only serve to impeach testimony given by State witnesses. We cannot say that the consideration of the evidence would effect the result of the trial.

Finding no error, we affirm the conviction.

**AFFIRMED.**