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# IN THE
# COURT OF APPEALS OF INDIANA

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| ROGER A. GREATHOUSE, JR., | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 65A01-0706-PC-247 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0611-PC-556

**January 22, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Roger A. Greathouse appeals the denial of his petition for post-conviction relief, which was premised on the discovery of new evidence. We reverse.

## FACTS AND PROCEDURAL HISTORY

The facts of the case underlying Greathouse's petition for post-conviction relief were described in our memorandum opinion on his direct appeal:

> At approximately 9:30 p.m. on October 14, 2003, Deputy Mark Saltzman and Deputy John Montgomery of the Posey County Sheriff's Department went to 2120 Bundy Road in Posey County to investigate a complaint of electricity theft. In a very rural area, 2120 Bundy Road was a small, single-family residence surrounded by harvested fields. As the deputies stepped from their vehicles, both "immediately noticed" a strong odor of ether hanging in the air and emanating from the residence. Lighting inside made three men visible through a side kitchen window – Jack Hansen ("Jack"), his brother Tim Hansen ("Tim"), and Ricky Hanmore. Before the deputies reached the residence door, Jack emerged to meet them. Because the odor of ether was so strong, Deputy Saltzman became concerned for the safety of any occupants of the house and asked Jack whether anyone else was inside. Jack said "yes," and Saltzman asked him to bring them out. Jack went in and brought out Tim and Hanmore. Jack indicated that he was renting the residence, and he gave Saltzman consent to search it.
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> Saltzman entered the residence and "immediately noticed . . . a large vapor cloud hanging in the air," which he described as being "a visible cloud of gas" that "smelled." In the kitchen, Saltzman saw "numerous items" indicating the presence of a methamphetamine lab.
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> Saltzman went outside and informed Montgomery to place Jack, Tim, and Hanmore in custody, and he summoned the Posey County Narcotics Unit, as well as a fire truck and EMS. Saltzman twice asked Jack whether "there was anyone else in the residence," and Jack replied, "I don't think so."
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> Saltzman and Montgomery entered the residence. Montgomery also noted the "strong odor of ether" and the "fog-type gas in the air." The deputies first proceeded through the living room area, which contained a ragged couch and trash on the floor. Saltzman then went toward the bathroom and Montgomery toward the kitchen. As Montgomery entered the small kitchen, Greathouse "came around the corner" from a pantry-like area that was offset into the kitchen wall. Greathouse immediately "went back into

this offset" and "hunkered back into the corner," trying to use his cell phone. The deputies handcuffed Greathouse and removed him from the residence.

Greathouse told Saltzman that he and the other men "had been sitting at the kitchen table playing cards all evening." Tim told Montgomery that "he had just got there." A thorough search of the residence revealed no playing cards.

On October 15, 2003, the State charged Greathouse with one count of dealing in methamphetamine as a class A felony, alleging that Greathouse "did knowingly manufacture methamphetamine" in a quantity of more than three grams. Greathouse was also charged with possession of methamphetamine, a class C felony, and possession of chemical reagents or precursors with intent to manufacture, a class D felony. He was tried by a jury on January 15 – 16, 2004.

Montgomery testified that when he first saw Greathouse, he (Greathouse) was within a foot of the kitchen table. Kenneth Rose, supervisor of the Posey County Narcotics Unit, testified about the evidence found inside the house. On the kitchen table were pliers, lithium batteries, lithium batteries with the outer casing removed, and a quart jar. On the floor by the table were pieces of lithium battery casings. On the kitchen counter, within 6 – 7 feet of where Greathouse was first seen, were jars containing 2.89 grams of methamphetamine and 3.65 grams of methamphetamine with indications of ephedrine and pseudoephedrine, and some coffee filters. Also on the kitchen counter was a plastic bottle made into a hydrogen chloride gas generator, a box of table salt, and a can of drain opener indicating that it contained sulfuric acid. Rose explained how pliers were used to dismantle lithium batteries in order to use the lithium metal strip; how coffee filters were used to separate liquid from methamphetamine; how a hydrogen chloride gas generator was assembled from a plastic soft drink bottle; and how sulfuric acid was mixed with common table salt "to form [. . .] hydrochloric acid," which "forms hydrogen chloride gas," in turn causing "a chemical reaction or a bubbling sensation, which activates the actual forming of the finished product of methamphetamine."

Rose further testified that in the pantry area (from which Montgomery first saw Greathouse emerging), described as like "a small, walk-in closet . . . without a door," were 8 feet of plastic tubing, more containers of salt, more glass jars, a can of "HEET, which contains the alcohol that's used in the early stages of soaking out ephedrine or pseudoep[h]edrine pills," numerous pills containing ephedrine and pseudoephedrine, three cans of

> "starting fluid which contains ether," a scale coated with white powder residue, and an air tank containing anhydrous ammonia. Rose testified, with graphics, about how methamphetamine is commonly manufactured by using ephedrine or pseudoephedrine, an alcohol-based product like HEET, coffee filters, lithium, anhydrous ammonia, ether, and a hydrogen chloride gas generator. Rose concluded with his opinion that based upon the evidence found, methamphetamine was being manufactured in the kitchen area of 2120 Bundy Road. Rose further testified that the process of manufacturing methamphetamine takes at least two hours to complete.

*Greathouse v. State*, Cause No. 65A04-0403-CR-134, slip op. at 2-5 (Ind. Ct. App. Dec. 22, 2004) (citations omitted). Greathouse was charged with dealing in methamphetamine as a Class A felony,[1] possession of methamphetamine as a Class C felony,[2] and possession of precursors as a Class D felony.[3] A jury found him guilty as charged.

Jack was also charged in connection with the methamphetamine lab. He was offered a plea agreement conditioned on his not testifying at Greathouse's trial. Jack refused to be deposed by Greathouse. Greathouse did not subpoena Jack to testify at his trial. During Greathouse's trial, Jack was being held at the county jail pending his own trial. After Greathouse was found guilty, Jack accepted the plea agreement offered by the State.

On October 31, 2006, Greathouse petitioned for post-conviction relief. A hearing was held on the petition on February 14, 2007. At the hearing, Jack testified the methamphetamine lab was his and Greathouse had no involvement in the lab.

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[1] Ind. Code § 35-48-4-1.1(b).

[2] Ind. Code § 35-48-4-6.1(b)(1).

[3] Ind. Code § 35-48-4-14.5(e).

Greathouse argued Jack's testimony was newly discovered evidence entitling him to a new trial. The post-conviction court denied the petition, finding Jack's testimony was not newly discovered evidence because Greathouse "was aware that Jack would not be called at his trial." (Appellant's App. at 101.)

## DISCUSSION AND DECISION

In order to obtain a new trial to present newly discovered evidence, the petitioner must demonstrate:

> (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

*Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On appeal, Greathouse must demonstrate the post-conviction court abused its discretion by not finding the evidence satisfies the nine-factor test. *Powell v. State*, 714 N.E.2d 624, 627 (Ind. 1999).

The post-conviction court's finding the evidence was not newly discovered because Greathouse knew Jack would not testify does not address whether Greathouse could have produced that testimony at his trial. The State argues the result is correct because Greathouse did not make an effort to produce Jack's testimony by subpoenaing him.

The State relies on *Wisehart v. State*:

> The Fifth Circuit has observed that "newly available" evidence is not necessarily synonymous with "newly discovered" evidence. This is particularly the case when a witness comes forward with exculpatory testimony after trial has been completed. . . . [E]vidence is not "newly

> discovered" if due diligence was not used to discover it in time for trial. We have rejected as not meeting the [nine-part test] newly available evidence consisting of post-trial exculpatory testimony from a co-defendant, accomplice or alibi witness where there was no effort made to produce it at trial.

693 N.E.2d 23, 36 (Ind. 1998) (citations omitted), *cert. denied* 526 U.S. 1040 (1999).

However, the facts of *Wisehart* are distinguishable. Wisehart knew two other men were involved in the offense for which he was charged. One of them was even interviewed. Nevertheless, Wisehart made no effort to have either of them testify at his trial. Greathouse, on the other hand, tried unsuccessfully to depose Jack.

"The requirement of due diligence includes a showing of why the evidence was unavailable if the witnesses were known to the defense. Without some showing of intentional withholding by the witness, a person who testifies at trial can be assumed to have been available for whatever exploration is appropriate." *Stephenson v. State*, 864 N.E.2d 1022, 1053 (Ind. 2007). Jack intentionally withheld his testimony, as he was entitled to do under the Fifth Amendment, and refused to be deposed by Greathouse. Furthermore, the State conditioned its offer for a plea bargain on Jack's refusal to testify for Greathouse. Had Greathouse subpoenaed Jack, he most likely would have refused to testify.

Even if Jack had testified, the content of that testimony would have been a complete surprise, as he had refused to give a deposition. Assuming Greathouse had no involvement in the methamphetamine lab, Greathouse had no way of knowing whether Jack would tell the truth if he took the stand. He did not have the benefit of a deposition to discover the likely content of Jack's testimony or to impeach Jack if he gave

unfavorable testimony at trial. Under the circumstances, we cannot say Greathouse was not diligent for failing to subpoena Jack.

In the alternative, the State argues Jack's testimony would not be credible because he now has nothing to lose by exculpating Greathouse. We disagree. Jack received a plea agreement from the State on the condition that he not testify in favor of Greathouse. We cannot say his decision to come forward now does not place him in jeopardy. Furthermore, the record does not reflect any motive for Jack to lie on Greathouse's behalf. They are neither relatives nor close friends. At the post-conviction hearing, Jack testified he had met Greathouse only twice before they were arrested.

Finally, the State argues Jack's testimony is not likely to produce a different outcome. We disagree. At Greathouse's trial, the bulk of the State's case proved only that Greathouse was at the scene of a methamphetamine lab. His involvement in the lab was implied from officers' testimony about his furtive movement when he was first discovered and about his unconfirmed statement the men had been playing cards. Although we found this evidence sufficient to support a conviction, the case against Greathouse was only circumstantial. Greathouse could not produce any witnesses on his behalf. Given the circumstantial nature of the State's case, we cannot say it would not make a difference for Greathouse to have at least one witness testify on his behalf. *See Schuster v. State*, 406 N.E.2d 288, 290 (Ind. Ct. App. 1980) (discussing cases where new trial was granted because another person confessed and State's evidence was tenuous). Therefore, we conclude Greathouse satisfied the test for newly discovered evidence and he is entitled to a new trial.

Reversed.

DARDEN, J., and CRONE, J., concur.