STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 6, 2005
v	No. 257288 Wayne Circuit Court
AZIZUL ISLAM, Defendant-Appellee.	LC No. 00-002335

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

We concur with the findings and conclusion within Judge Gage's concurring opinion, except for one issue noted below. We therefore all concur in the reversal of the trial court's order granting defendant's motion for relief from judgment. However, in our view, the standard set forth in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), rather than the standard found within MCR 6.508(D)(3), applies to this issue of newly discovered evidence. Applying the *Cress* test, the result remains the same: the overwhelmingly strong circumstantial evidence of defendant's guilt, coupled with the fact that the planted evidence was not even admitted into evidence at trial, firmly established that allowing impeachment evidence against Anderson would not result in a different result on retrial. *Cress*, *supra* at 692.

MCR 6.508(D)(3) clearly states that the articulated standard for relief from judgment (i.e., good cause and actual prejudice) only applies if the motion "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter . . . ." Here, it is undisputed that defendant could not have raised the planting of evidence issue in the prior appeal, for it had not been discovered until the prior appeal was already pending in this Court. Although defendant attempted to raise the issue by way of a motion to remand, this Court denied him the opportunity to address the issue. Additionally, this is defendant's first post-conviction motion. Thus, MCR 6.508(D)(3)'s standard for setting aside a judgment does not apply.[1] Rather, the Supreme Court's test from *Cress* applies to this issue.

[1] *People v McSwain*, 259 Mich App 654; 676 NW2d 236 (2003), does not require a different result, as neither party raised an issue as to the applicability of MCR 6.508(D)(3).

In *Cress*, *supra* at 692, the Court set forth the four-prong test to be used in reviewing a motion for a new trial based upon newly discovered evidence:

> 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.[2] [Citation omitted.]

It is always difficult to find that a trial court abused its discretion. *People v Ackerman*, 257 Mich App 434, 437-438; 669 NW2d 818 (2003). Particularly so here, where the learned trial court articulated her reasons for the decision in a well-written opinion. Nonetheless, because the trial court applied the incorrect standard, and under the correct standard defendant's motion should not have been granted, the trial court's decision was an abuse of discretion. This is so because the new evidence would not make a different result probable on retrial.

Judge Gage's opinion adequately sets forth the facts which clearly supported a jury determination of defendant's guilt. These facts are, of course, independent of any evidence of saws, and are incredibly persuasive of defendant's guilt. *People v Azizul Islam*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2002 (Docket No. 231264). Just as importantly, the planted saw was never admitted into evidence, the trial court gave at least three agreed upon cautionary instructions regarding the irrelevancy of any saw testimony, and there was undisputed testimony that the victim was already deceased by the time she was dismembered.[3] In light of all these facts, the new evidence would not have resulted in a different result on retrial.

Reversed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

[2] In support of this test, the *Cress* Court cited, *inter alia*, MCR 6.508(D).

[3] Thus, any "saw evidence" would not have been relevant to defendant's murder conviction.