

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1807-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE W. LIS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Langlade County: ROBERT A. KENNEDY, Judge. *Affirmed.*

MYSE, J. George W. Lis appeals a judgment of conviction for one count of retail theft as a repeater contrary to §§ 943.50(1m) and 939.62, STATS., and an order denying his motion for postconviction relief. Lis raises four issues on appeal: (1) whether the trial court erred when it admitted evidence regarding tax stamp numbers on the bottom of four packages of cigarettes alleged to have been stolen by Lis; (2) whether the district attorney's misstatement during closing argument suggesting that each retail outlet has an identifiable tax stamp number warrants a new trial; (3) whether newly discovered evidence regarding tax stamp numbers warrants a new trial; and (4) whether a new trial should be granted in the interests of justice. Because this court concludes that none of these issues provides a basis for relief, the judgment and the order are affirmed.

This case involves a claim that Lis stole four packages of cigarettes from the Copps store in Antigo. Wayne Kropidlowksi, a Copps security guard, testified that he observed Lis near the cigarette racks with three or four packages of cigarettes in the baby seat of his shopping cart. Kropidlowksi observed Lis as he went down the aisles and placed the cigarettes inside his jacket. Kropidlowksi further observed Lis go through the checkout line without placing the cigarettes on the checkout counter with the rest of his purchases.

Kropidlowksi and a produce clerk, Michael Clark, pursued Lis outside the store, confronted him with the accusation of stealing cigarettes, and asked him to return to the inside of the store. Lis denied stealing, placed the groceries he had purchased in his truck and drove away.

The store manager then contacted the police. When the police officer arrived, Lis had already returned to the store parking lot. Lis explained that he had picked up a couple of packs of cigarettes but realized that he did not have enough money to pay for them and the other items so he left the cigarettes on a shelf by the sodas. Lis said that he was angry about the accusation of theft when he initially left the parking lot but decided to return to clear up the matter. Douglas Klemp, the police officer who responded to the call, then permitted Lis to take his daughter home and instructed him to show up at the police station later.

Clark told Klemp that as he observed Lis drive down the highway, he saw Lis's brake lights go on for a couple of seconds before he turned around and came back to the store. Klemp then retraced the route that Lis had driven before returning to the parking lot and found four packages of cigarettes lying in the snow around the area where Clark told him that he saw Lis's brake lights on. Although it was snowing at the time, the cigarette packages were not covered with snow. Klemp asked Kropidlowksi to check the tax stamp numbers on the cigarettes of the same brands within the Copps store. Kropidlowksi did so and discovered that the numbers on the packages recovered were identical to the numbers on the packages in the store. The cigarette packages were tested for fingerprints but no match to Lis could be determined.

The trial court denied Lis's motion in limine to preclude evidence regarding the tax stamp numbers based on both foundation and hearsay grounds. Lis, through defense counsel, renewed the objection during trial and the objection was overruled. During closing argument the district attorney argued that the tax stamp was proof that the cigarettes found in the snow came from the Copps store and suggested that each store gets its own tax number.

The jury returned a guilty verdict, and the court sentenced Lis to a two-year prison term. At the postconviction hearing, Brett J. Rogers, a special agent for the Wisconsin Department of Revenue, testified as an expert on cigarette tax stamps. Rogers testified that tax stamps are sold to wholesalers in rolls of 30,000 stamps with each stamp in the roll having the same number. The wholesaler affixes the stamps on the cigarettes and distributes the cigarettes to retailers. Copps is a wholesaler under this scheme and distributes the stamped cigarettes to Copps supermarkets for retail sale. Rogers further testified that the district attorney's suggestion to the jury during closing argument that each retail outlet has its own tax stamp number was inaccurate and that there is no absolute certainty that a tax stamp number found on the bottom of a package of cigarettes can be traced to any specific retail outlet. The tax stamp, however, does indicate that the origin of the cigarettes was with the Copps supermarket chain.

Lis first contends that the trial court erred when it admitted evidence regarding the tax stamp numbers. The admissibility of evidence is discretionary with the trial court. *State v. Peters*, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App. 1995). Discretionary decisions will be upheld as long as the trial court examined the relevant facts, applied the proper standard of law and reached a conclusion a reasonable judge could reach. *Id.* This court will not find an abuse of discretion in the admissibility of evidence as long as there is a reasonable basis for the trial court's determination. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

Although it is unclear, Lis's objection to the admission of the tax stamp evidence appears to be grounded in a claim of relevancy. Kropidowski's testimony was that the tax stamps were assigned to his company and distributed through a warehouse to Copps stores, and that the cigarettes found in the snow and the cigarettes for sale in the Antigo Copps retail outlet had the same tax stamp number. Lis argues that the evidence should not have been

admitted because the tax stamp numbers did not show with certainty that the cigarettes were from the Antigo Copps store. However, relevancy is defined in § 904.01, STATS., as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." While it is possible that the cigarette packages found in the snow could have come from another Copps retail outlet, the tax stamps do make it more probable than not that they came from the Antigo Copps store when all of the evidence is considered. It is the defense counsel's role to demonstrate that the cigarettes found in the snow could have originated from any Copps store and not just Copps' Antigo outlet. Questions as to the weight to be attached to this evidence and the reliability of the evidence along with other explanations as to how the cigarettes came to be in the snow are within the province of defense counsel. Based upon the tax stamp numbers, a reasonable juror could believe that the cigarettes found a short distance away from the Antigo Copps store originated from that store, notwithstanding the possibility that another explanation existed.

Lis further suggests that the evidence should not have been admitted because there was insufficient foundation of Kropidlowksi's knowledge of how tax stamps are handled. However, Kropidlowksi's testimony that he compared the numbers between the cigarettes for sale at the store and those found in the snow does not require any expertise. Further, Kropidlowksi's suggestion that the origin of the cigarettes found in the snow was the Antigo Copps retail outlet is not an expert's opinion but a conclusion based upon his understanding of how tax stamps operate. This conclusion does not go to admissibility or qualifications of the witness but to the weight to be attached to the fact that there were identical tax numbers on the cigarettes. Accordingly, this court concludes that the trial court did not erroneously exercise its discretion by admitting the evidence.

Next, Lis contends that this court should order a new trial because of the district attorney's alleged misstatement during closing argument. However, Lis has waived any objection to the district attorney's closing argument by his failure to move for a mistrial. See *Haskins v. State*, 97 Wis.2d 408, 424, 294 N.W.2d 25, 36 (1980).

Lis further contends that Rogers' testimony is newly discovered evidence and warrants a new trial. In order for due process to require a new

trial, newly discovered evidence must satisfy the following criteria: (1) the evidence was not discovered until after trial; (2) the defendant was not negligent in seeking the new evidence; (3) the new evidence is material to an issue; (4) the new evidence is not merely cumulative to evidence presented at trial; and (5) a reasonable probability exists that a different result would be reached in a new trial. *State v. Coogan*, 154 Wis.2d 387, 394, 453 N.W.2d 186, 188 (Ct. App. 1990). The defendant must establish his right to a new trial by clear and convincing evidence. *Id.* at 395, 453 N.W.2d at 186.

This court concludes that this evidence is not newly discovered and does not warrant a new trial. Lis knew that the tax stamp evidence was an issue before trial. At the motion in limine, counsel for Lis made statements that she had knowledge that the Department of Revenue was responsible for the disbursement of tax stamps. Moreover, the defendant has not shown that a reasonable possibility exists that a different result would be reached in a new trial. The evidence is consistent with Kropidlowski's testimony and is relevant to show that the cigarettes came from the Copps store. Considering all the evidence presented at trial, it is reasonable for the jury to conclude that the cigarettes in the snow originated from the Copps store in Antigo even though the tax stamp numbers only prove the cigarettes came from the Copps supermarket chain. Therefore, this court concludes that this evidence does not warrant a new trial.

Finally, Lis contends that a new trial would be in the interest of justice. This is a discretionary decision with this court. *State v. Penigar*, 139 Wis.2d 569, 577-78, 408 N.W.2d 28, 32 (1987). This court finds no basis to conclude that justice has miscarried or that a new trial would lead to a different result. Accordingly, this court affirms the judgment of conviction and the order denying postconviction relief.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.