

[Cite as *State v. Grinnell*, 2010-Ohio-3028.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1048
 : (C.P.C. No. 94CR-11-6418)
 Timothy Grinnell, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 30, 2010

Mark E. Piepmeier, Special Prosecuting Attorney, and
William E. Breyer, for appellee.

Timothy Grinnell, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Timothy Grinnell, from a judgment of the Franklin County Court of Common Pleas, denying appellant's motion for leave to file a motion for new trial, and also denying appellant's motion for new trial.

{¶2} In 1994, a Scioto County grand jury indicted appellant on two counts of aggravated murder. Venue was subsequently moved to Franklin County, and the case came for trial before a jury beginning on September 5, 1995. The jury returned verdicts finding appellant guilty of both counts of aggravated murder. By judgment entry filed

October 2, 1995, the trial court sentenced appellant to two life sentences, with the sentences to run concurrently. Appellant appealed his conviction, and, in *State v. Grinnell* (1996), 112 Ohio App.3d 124, this court affirmed the judgment of the trial court.

{¶3} On October 6, 2008, appellant filed a motion for leave to file a motion for new trial, asserting newly discovered evidence, and a motion for new trial based on newly discovered evidence. The state filed responses in opposition to appellant's motions. The trial court filed a decision on October 13, 2009, denying appellant's motion for leave to file a motion for new trial, and denying his motion for new trial.

{¶4} On appeal, appellant sets forth the following nine assignments of error for this court's review:

ASSIGNMENT OF ERROR NO. 1 The Decision considers only the first two Affidavits offered by Defendant in support of his Motion and altogether fails to consider the last two Affidavits, by Edward Julious (April 2008) and by Aaron Jefferson (May 2008), which started the time running within which Defendant had to file his Motion for New Trial.

ASSIGNMENT OF ERROR NO. 2 Contrary to the Trial Court, the five or six month period within which Defendant assembled, caused to be typed, and filed his Motions was objectively reasonable and exhibited due diligence.

ASSIGNMENT OF ERROR NO. 3 The Trial Court altogether failed to consider the special conditions of preparing pleadings while in supermax confinement which must enter into an assessment of whether Defendant exhibited due diligence.

ASSIGNMENT OF ERROR NO. 4 Since Defendant alleges actual innocence, any procedural default should have been disregarded by the Trial Court.

ASSIGNMENT OF ERROR NO. 5 The Trial Court erred in finding that Defendant knew or should have known about Girdy's confession at time of trial.

ASSIGNMENT OF ERROR NO. 6 It was plain error for the Trial Court during Defendant's trial to fail to instruct the jury as to the diminished weight that should be given to the testimony of complicitors.

ASSIGNMENT OF ERROR NO. 7 The State violated its obligation under Brady v. Maryland to produce statements to the Ohio State Highway Patrol by prisoners Tony Taylor and Reginald Williams naming individuals other than Defendant as the persons they witnessed using the console to open cell doors for the Death Squad.

ASSIGNMENT OF ERROR NO. 8 The State violated its obligation under Brady v. Maryland and Napue v. Illinois to produce evidence indicating that key prosecution witnesses Louis Jones and Stacey Gordon were motivated to testify for the prosecution by inducements more significant than transfer to another penal facility or a desire to see justice done, and to correct misstatements of these witnesses about the sequence of events that led to their testimony.

ASSIGNMENT OF ERROR NO. 9 The Trial Court's reference to "duress" as a purported argument by Defendant's counsel at trial must be disregarded because no transcript of such argument has ever been provided to Defendant.

{¶5} Appellant's first, second, third, fourth, fifth, and ninth assignments of error are interrelated and will be discussed together. The primary issue raised by appellant under these assignments of error is whether the trial court erred in denying his motion for leave to file a motion for new trial.

{¶6} By way of background, appellant's convictions for aggravated murder arose out of events following a prison riot at the Southern Ohio Correctional Facility ("Lucasville") in April 1993. See *Grinnell* at 128. A number of inmates, as well as one prison guard, were killed during the incident. Appellant was charged in connection with the beating deaths of two inmates, Darrell Depina and Albert Staiano. During the rioting,

a group of inmates led by Keith LaMar ("the LaMar group") entered a residential area, designated as the "L-6 cell block," with the intent of killing certain prisoners deemed to be "snitches." *Id.* at 128-29. Muslim inmate leaders were in control of the L-6 cell block, and they allowed the LaMar group to enter that area.

{¶7} There was testimony at trial that appellant operated a console, used to open and close cell doors, and that he "opened the cell doors as requested by the LaMar group." *Id.* at 129. Specifically, the state's evidence included the testimony of inmate Robert Bass, who testified that he observed appellant opening and closing cell doors, and that he heard appellant giving orders as to where to put various inmates and guards. Inmate Jack Spurlock testified that appellant was in charge of the console, and Spurlock followed appellant's orders.

{¶8} Inmate Anthony Walker testified that he observed appellant operating the console and opening the doors to cells in order to provide access to the LaMar group. Walker testified that he heard appellant order inmate Eric Girdy "to 'finish off' an inmate" who had been beaten by the LaMar group, but was not yet dead, as well as another inmate who Girdy found hiding under a bed. *Id.* at 139. Appellant also ordered Walker to guard the back door of the cell block. Walker testified that he observed appellant open a cell door in order for the LaMar group to beat inmate Staiano to death.

{¶9} Inmate Donald Cassell testified that he observed two inmates murdered as a result of appellant opening the doors of cells in which the victims were locked. While Cassell observed other inmates, including Girdy, near the console area, appellant was the only individual Cassell observed operating the console. Other inmates, including Kenneth Law, testified that they observed appellant in the console area. At trial, as part

of his defense, appellant "presented the testimony of several inmates who stated that appellant was threatened and forced to operate the console or was not present in the area at the time of the killings." *Id.* at 142.

{¶10} Pursuant to Crim.R. 33(A)(6), a new trial may be granted on motion of a defendant "[w]hen new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(B) requires that a motion for new trial based upon newly discovered evidence be filed "within one hundred twenty days after the day upon which the verdict was rendered."

{¶11} If a defendant fails, under Crim.R. 33(B), "to file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision, then he or she must seek leave from the trial court to file a 'delayed motion.'" *State v. Unsworth*, 6th Dist. No. L-09-1205, 2010-Ohio-398, ¶18, quoting *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959, ¶20. In order to obtain such leave, a defendant "must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days." *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶19. A defendant is "unavoidably prevented" from filing a motion for new trial if he or she "had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *Id.*

{¶12} In addition to the requirement that a defendant show he or she was unavoidably prevented from discovering the evidence relied upon to support a motion for new trial, a defendant "also must show that he filed his motion for leave within a

reasonable time after discovering the evidence relied upon to support the motion for new trial." *State v. Gray*, 8th Dist. No. 92646, 2010-Ohio-11, ¶18. See also *Unsworth* at ¶18, quoting *Willis* at ¶16 (while Crim.R. 33(B) "does not provide a specific time limit for the filing of a motion for leave to file a delayed motion for new trial, '[a] trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence' "). See also *Berry* at ¶37. In the event there has "been an 'undue delay' between the time that the evidence was discovered and the filing of the motion for new trial, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay." *Unsworth* at ¶18.

{¶13} If a defendant "has been allowed to file a motion for new trial, the decision whether to actually grant the new trial is left to the sound discretion of the trial court, and will not be reversed absent an abuse of that discretion." *State v. Neguse*, 10th Dist. No. 09AP-843, 2010-Ohio-1387, ¶8. In *State v. Petro* (1947), 148 Ohio St. 505, syllabus, the Supreme Court of Ohio held that a motion for new trial based upon newly discovered evidence requires a showing that the new evidence:

(1) [D]iscloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St., 410, approved and followed.)

{¶14} In his motion for leave to file a motion for new trial, appellant submitted various documents and affidavits, including the affidavits of inmates Eric Girdy and

Kenneth Law. GirDY averred in his affidavit that he was in L-6 cell block at the time of the 1993 incident and that appellant did not operate the console; rather, according to GirDY, appellant was standing by a water fountain watching the homicides. The affidavit of GirDY was dated April 16, 2002. Kenneth Law stated in his affidavit that he previously lied about observing appellant control the console during the riot. Law averred that he "[n]ever seen anyone open doors to cells in L-6." Law's affidavit was dated August 6, 2003.

{¶15} As noted under the facts, appellant was convicted in 1995, and he filed his motion for leave to file a motion for new trial on October 6, 2008, approximately 13 years after his conviction. The trial court denied appellant's motion for leave to file a motion for new trial based upon the court's determination that appellant's delay in bringing the motion was unreasonable. In reviewing appellant's reasons for delay, the trial court cited appellant's admission that "he has had the affidavits of Law and GirDY since they were provided by GirDY and Law in 2002 and 2003." The court, noting that appellant "unquestionably knew of GirDY's affidavit for six and a half years and Law's affidavit for over five years before he finally moved for leave to file a motion for new trial," determined that the delay "between five and six years between learning of the alleged newly discovered evidence and [appellant's] motion is unreasonable."

{¶16} Upon review, we find no abuse of discretion by the trial court in denying appellant's motion for leave to file a motion for new trial on the basis of unreasonable delay. As noted by the trial court, appellant acknowledged in his memorandum in support of his motion that the affidavit of GirDY became available to him in 2002, and that the affidavit of Law was made available in 2003. Appellant attempted to explain his delay on the basis that he was seeking further corroborating evidence, citing in support the

affidavits of Edward Julious, dated April 2008, and Aaron Jefferson, dated May 2008. Appellant maintains, under his first assignment of error, that the trial court erred in failing to consider those subsequent affidavits. In a related argument, appellant contends, under the second assignment of error, that the time period in which he assembled and filed his motions was reasonable and exhibited due diligence. Appellant asserts that the time in which to file a motion does not begin to run until "the last piece of necessary evidence becomes available." We disagree.

{¶17} Ohio courts, including this court, have rejected similar claims seeking to justify delay on the basis that it was reasonable to submit all claims in a single proceeding after gathering evidence for a number of years. See, e.g., *Berry* at ¶39 (holding that "Crim.R. 33(B) does not allow a defendant to wait for further evidence to arise that will bolster his case"); *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶51 ("Cleveland has cited no authority for the proposition that it was reasonable for him to submit all of his claims in a single proceeding after gathering evidence for the past ten years or so").

{¶18} Appellant asserts that it was error for the trial court to ignore the special circumstances faced by a prisoner subject to "supermax confinement" (appellant's third assignment of error). As noted above, however, the record supports the trial court's finding that appellant had the affidavit of Girdy in 2002 and the affidavit of Law in 2003, and appellant has not shown that the conditions of his confinement excused his inaction for such a lengthy period of time.

{¶19} Under his fourth assignment of error, appellant requests that this court take "judicial notice of the growing trend in the direction of removing procedural roadblocks to

post-conviction claims of actual innocenc[e]." With respect to appellant's argument regarding post-conviction claims, "Ohio courts have been consistent in holding that a claim of actual innocence is not itself a constitutional claim, nor does it establish a substantive ground for post conviction relief." *State v. Davis*, 5th Dist. No. 2008-CA-16, 2008-Ohio-6841, ¶138.

{¶20} This principle has been held applicable in cases involving motions for new trial, where courts have recognized "the difficulty placed upon the state in prosecuting a case once time has passed such as having to use stale evidence, contending with fading memories, and the dispersion of witnesses." *State v. Mack* (Oct. 28, 1999), 8th Dist. No. 75086 (rejecting claim that motion for new trial should have been granted because newly discovered evidence established actual innocence; strength of appellant's newly discovered evidence, produced by defendant eight years after conviction, not high enough to warrant grant of new trial); *State v. Tolbert* (Dec. 12, 1997), 1st Dist. No. C-960944 (denying motion for new trial based upon claim of actual innocence).

{¶21} Accordingly, we find no merit to appellant's contention that any procedural default should have been disregarded by the trial court based upon a claim of actual innocence. Further, as noted by the state, appellant did not raise this issue before the trial court.

{¶22} Appellant argues, under his fifth assignment of error, that the trial court erred in finding that he knew, or should have known, about Girby's confession at the time of trial. We note that, while the trial court denied appellant's motion for leave on the basis of unreasonable delay, the court alternatively found that the affidavits of Girby and Law did not meet the definition of newly discovered evidence because the essence of the two

affidavits was known before trial and actually utilized by the defense. Specifically, the court noted that appellant had the benefit of pre-trial statements by Girdy and Law, and that Girdy admitted in his statement that he was present during the deaths of the inmates. Further, other inmate statements provided to appellant during discovery identified Girdy as operating or being present at the console during the killings. The trial court also noted that appellant listed Law and Girdy as potential witnesses for the defense, and that appellant had written to the prosecution that Girdy opened the cell doors to allow the "death squad" into various cell blocks. Thus, the trial court determined, appellant was aware of evidence that Girdy operated the console at some point during the riot and murders. The trial court further found that the evidence submitted by appellant did not show a "strong probability" that there would be a different result if the evidence were presented at a new trial.

{¶23} The record supports the trial court's findings that appellant was aware, at the time of trial, of Girdy's purported activities. A review of the discovery materials shows that pre-trial statements of various inmates identified Girdy as being at or near the console during the incident. Further, in Girdy's own pre-trial statement, he admitted to being present in L-6 cell block (sitting by the ice machine near the console). As noted in this court's decision affirming appellant's conviction, appellant presented at trial the testimony of Prentice Jackson, who testified that he observed Girdy operating the console; similarly, inmate Leroy Elmore testified that he observed "Girdy at the control panel." *Grinnell* at 142. Upon review, we agree with the trial court's determination that the affidavit of Girdy did not meet the definition of newly discovered evidence as set forth under *Petro*.

{¶24} Appellant contends, under his ninth assignment of error, that the trial court's reference to "duress" as a purported defense by appellant's counsel at trial was erroneous, and that this court should disregard the issue of duress. However, we find no error with the trial court's statement that appellant, during trial, "defended on the grounds that either he had been threatened by other rioters and was under duress, or he was not present when the cell doors were opened." This court, in our decision affirming appellant's conviction, noted that appellant, in his defense, "presented the testimony of several inmates who stated that appellant was threatened and forced to operate the console or was not present in the area at the time of the killings." *Grinnell* at 142. Additionally, this court's decision also noted that appellant had requested, at trial, an instruction on duress. *Id.* at 143-44.

{¶25} Based upon the foregoing, we find no abuse of discretion by the trial court in denying appellant's motion for leave to file a motion for new trial; nor do we find error with the trial court's determinations that the affidavits of Girdy and Law did not constitute newly discovered evidence, and that the affidavits did not disclose a strong probability of producing a different outcome at trial. Accordingly, appellant's first, second, third, fourth, fifth, and ninth assignments of error are without merit and are overruled.

{¶26} Under his sixth assignment of error, appellant contends it was plain error for the trial court, during appellant's trial, to not instruct the jury as to the weight to be given the testimony of complicitors. In support, appellant cites portions of testimony from the trial transcript. However, because this claim is based upon matters that were part of the record and could have been raised on direct appeal, it is barred by the doctrine of res judicata. See *State v. Phillips*, 9th Dist. No. 20692, 2002-Ohio-823 (claimed error

regarding jury instructions could have been raised on direct appeal based on information contained in the trial court record and was barred by *res judicata*). Thus, appellant's sixth assignment of error is without merit and is overruled.

{¶27} Under his seventh and eighth assignments of error, appellant argues that the state violated its obligation to produce materials favorable to him as required under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1184. Specifically, appellant claims *Brady* violations with respect to (1) statements made by inmates Tony Taylor and Reginald Williams to the Ohio Highway Patrol, and (2) purported inducements made by the state to inmates Louis Jones and Stacey Gordon to testify for the prosecution.

{¶28} Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. at 1196. Evidence that is suppressed by the prosecution "is 'material' within the meaning of *Brady* only if there exists a 'reasonable probability' that the result of the trial would have been different had the evidence been disclosed to the defense." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶27.

{¶29} Upon review, we find no merit to appellant's *Brady* claims. As noted by the state, the statements of Taylor and Williams were part of supplemental discovery materials provided to appellant's counsel prior to trial. As such, appellant cannot claim a *Brady* violation. See *LaMar* at fn. 2 ("[b]ecause the defense knew *before* trial of the contents of inmate statements and the names of the inmates who gave them, there is arguably no *Brady* violation as a matter of law" (emphasis sic)). Additionally, the information contained in those materials, regarding Girdy's activities during the events at

issue, was known to defense counsel prior to trial. Courts have recognized that "*Brady* is concerned only with cases in which the government possesses information which the defendant does not." *United States v. Mullins* (C.A.6, 1994), 22 F.3d 1365, 1371.

{¶30} As to allegations by appellant that inmates Jones and Gordon were given "deals" which amounted to impeaching evidence that should have been provided under *Brady*, the trial court found that the fact certain inmates were transferred to other institutions for safety purposes did not constitute *Brady* material. The trial court further noted that the defense was advised of prisoner transfers during pre-trial discovery, and thus such evidence was available at trial.

{¶31} A review of the record indicates that defense counsel would have been aware, through the state's pre-trial witness list and a supplemental discovery document, that certain inmates had been transferred from Lucasville to Oakwood Correctional Facility. Further, one of the supplemental discovery documents made available to trial counsel included a statement by the assistant special prosecutor that: "If an inmate testifies and his life becomes threatened because of testifying, the undersigned has told a few inmates that the undersigned will do anything which he might be capable of doing to have them transferred to a prison where they will be safe." The prosecutor further represented that "[n]o specifics have ever been discussed," and "[n]o promises of any particular facility or transfer have ever been made." Here, the record supports the trial court's determination that information regarding transfers was available to defense counsel prior to trial, and we agree with the trial court's determination that no *Brady* violation has been shown.

{¶32} Accordingly, appellant's seventh and eighth assignments of error are not well-taken and are overruled.

{¶33} Based upon the foregoing, appellant's nine assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
