

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No. 18CA3854
	:
vs.	:
	:
LARRY I. DELAWDER,	: <u>DECISION AND JUDGMENT</u>
	: <u>ENTRY</u>
Defendant-Appellant.	:

APPEARANCES:

R. Tracy Hoover, Portsmouth, Ohio, for Appellant.

Shane A. Tieman, Scioto County Prosecutor, and Jay Willis, Assistant
Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

Smith, P. J.:

{¶1} Larry I. Delawder, (“Appellant”), appeals the judgment entry of the Court of Common Pleas, Scioto County, dated October 1, 2018, which denied his Motion to File a Delayed Motion for a New Trial/Petition for Post-Conviction Relief. On appeal, Appellant asserts that (1) the trial court erred and abused its discretion when it found he was not unavoidably prevented from filing his delayed motion for leave to file motion for new trial; and (2) this court should engage in a de novo review of his identical argument as to the delayed motion for leave to file a postconviction petition. Upon our own review, we find no merit to Appellant’s assignments of error.

Accordingly, we overrule Appellant's assignment of error as it pertains to the delayed motion for new trial. To the extent that Appellant's motion constituted a delayed motion for post conviction relief, we find that the motion was time-barred and should have been dismissed. Thus, we affirm the judgment of the trial court as modified.

FACTS AND PROCEDURAL HISTORY

{¶2} We recount the facts and procedural history as set forth in Appellant's previous appeal to this court in *State v. Delawder*, 4th Dist. Scioto No. 10CA3344, 2012-Ohio-1923 ("*Delawder I*"), ¶¶ 7, 8, and 9. A grand jury indicted Delawder on two counts of aggravated felony murder, felony murder, aggravated robbery, robbery, and felonious assault, naming Jotham Lee Parker as the victim for each count. The grand jury also indicted Delawder on two counts of felonious assault, naming Kyle McCleese and Chad McGlone as victims, and on other charges not relevant to the current appeal.

{¶3} Delawder and two cousins went to a bar called the Fish Bowl around 10:00 pm. Also at the bar that evening were regular patrons Parker (the decedent), McCleese, McGlone and Justin Preston. Initially, a disturbance broke out involving another patron named Richard Spencer and some of the other customers, possibly including Parker and/or his friends.

Spencer had to be removed from the bar. Later, a bartender who had served Delawder earlier that evening went outside to smoke and saw an individual she identified as Delawder breaking into Parker's vehicle. The bartender alerted Parker and his friends, who confronted the individuals they felt were breaking into the truck. Upon being confronted, Delawder and his companion, later discovered to be his cousin Calvin Dwayne Kersey, Jr., (“Kersey”), fled the scene with Parker and his comrades in hot pursuit. Delawder then ran to the residence where he was staying with relatives. A struggle ensued and Delawder mortally stabbed Parker with a knife while the two men were engaged in a scuffle. Delawder then ran into the house and his relatives threatened to call the “cops” on Parker and his friends. Shortly after, Delawder reappeared with a black object, later described as a metal tire tool or “pipe,” and began swinging it at his pursuers. Delawder did not hit anyone with the object but his attempts caused the others to back off. Delawder eventually disappeared into the house. When the police arrived, they found Delawder hiding in a bathroom where he had changed clothes and was attempting to shave his head.

{¶4} Delawder's version of the events was that he entered Parker's truck by mistake, believing it to be his cousin's truck, in which he had ridden to the bar. He initially told police he ran because he felt the group chasing

him was angry at him for “flirting with their women” in the bar. However, at trial he claimed he ran because the men chasing him had been involved in the earlier incident in the bar with Spencer. He also claimed he acted in self-defense when he stabbed Parker, who was violently assaulting him in the yard of his relatives. He indicated the relatives felt threatened by Parker and his friends, so he went after them with the tire tool to protect his relatives. He testified he “didn't know why” he had started to shave his head.

{¶5} A jury found Delawder guilty of various offenses stemming from the incident. In his direct appeal, he raised several assignments of error including the failure to merge certain allied offenses for purposes of sentencing. We sustained his assignments of error as to the allied offenses argument and remanded the matter for resentencing. The Supreme Court of Ohio did not allow further appeal. See *State v. Delawder*, 132 Ohio St. 3d 1516, 2012-Ohio-4021, 974 N.E. 2d 113 (Table).

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN DENYING
DELAWDER’S MOTION FOR LEAVE TO FILE MOTION
FOR NEW TRIAL.

II. THE TRIAL COURT ERRED IN DENYING
DELAWDER’S MOTION FOR LEAVE TO FILE PETITION
FOR POST-CONVICTION RELIEF.

{¶6} Because Appellant’s grounds for relief under both assignments

of error are identical in that his claims are premised on asserted newly discovered evidence not previously available to him, we will consider both assignments of error jointly.

STANDARD OF REVIEW

1. Motion for leave to file a new trial motion.

{¶7} Crim.R. 33(B) typically requires a defendant to file a new trial motion based upon newly discovered evidence “within one hundred twenty days after the day upon which the verdict was rendered.” *State v. Bennett*, 4th Dist. Scioto No. 16CA3765, 2017-Ohio-574, at ¶ 10. However, the rule allows a defendant to file a new trial motion based upon newly discovered evidence beyond the one hundred twenty day time period if “clear and convincing proof” shows “that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely.” *Id.* “The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner.” *State v. Waddy*, 10th Dist. Franklin No. 15AP-397, 2016-Ohio-4911, at ¶19, citing *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12–MA–44, 2012–Ohio–5360, at ¶ 11. “Clear and convincing evidence is ‘that measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such

certainty as is required “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’ ” *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595, 2016–Ohio–8195, 71 N.E.3d 1076, ¶ 19, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶8} If a defendant shows that he was unavoidably prevented from discovering the evidence, then the defendant must file a new trial motion “within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.” Crim.R. 33(B). *Bennett, supra*, at ¶ 11. The rule thus contemplates that a defendant seeking a new trial after the one hundred twenty day time period obtain permission from the trial court to file the motion. *State v. Lenoir*, 2nd Dist. Montgomery No. 26846, 2016–Ohio–4981, ¶ 18; *State v. Grissom*, 2nd Dist. Montgomery No. 26626, 2016–Ohio–961, at ¶ 17; *State v. Hatton*, 4th Dist. Pickaway No. 11CA23, 2013–Ohio–475, at ¶ 9.

{¶9} Trial courts ordinarily possess broad discretion when ruling on a defendant's motion for leave to file a new trial motion. *Bennett,, supra*, at ¶ 9; *Waddy, supra*, at ¶ 20; *State v. Hill*, 8th Dist.

Cuyahoga No. 102083, 2015–Ohio–1652, ¶ 16, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007–Ohio–1181, 869 N.E.2d 77, ¶ 19 (2d Dist.); *State v. Clumm*, 4th Dist. Athens No. 08CA32, 2010–Ohio–342, ¶ 14; *State v. Pinkerman*, 88 Ohio App.3d 158, 160, 623 N.E.2d 643 (4th Dist.1993). An “abuse of discretion” means that the court acted in an “ ‘unreasonable, arbitrary, or unconscionable’ ” manner or employed “ ‘a view or action that no conscientious judge could honestly have taken.’ ” *State v. Kirkland*, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶ 23. Moreover, a trial court generally abuses its discretion when it fails to engage in a “ ‘sound reasoning process.’ ” *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, “[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court.” *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34. Here, we must consider whether the trial court abused its

discretion in denying Appellant's motion for leave to file a motion for new trial.

2. Motion for leave to file a delayed petition for post-conviction relief.

{¶10} R.C. 2953.21(A)(2) provides that a petition for postconviction relief must be filed “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication.” *State v. Gavin*, 4th Dist. Scioto No. 16CA3757, 2017-Ohio-134, at 11; See, e.g., *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016–Ohio–2756, ¶ 15. In this case, the docket reflects the trial transcript in Appellant's direct appeal was forwarded to this court on or about July 5, 2011. Thus, any motion for postconviction relief at this point in time is obviously time-barred.

{¶11} However, R.C. 2953.23(A)(1), authorizes a trial court to address the merits of an untimely filed petition for postconviction relief only if: “(1) the petitioner shows either that he was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief....” *Gavin, supra*, at ¶ 12. Thus, we must consider whether Appellant made the requisite showing that he was unavoidably prevented from discovery of the facts upon which he now relies.

LEGAL ANALYSIS

{¶12} Attached to Appellant’s Motion for Leave to File a Delayed Motion for a New Trial/Petition for Post-conviction Relief was an affidavit from Calvin Dwayne Kersey, Jr. The information contained in Kersey’s sworn affidavit is that he “did everything he could to avoid being involved in Larry Delawder’s trial,” including changing his cell phone number, “staying gone,” and avoiding his own family. Kersey further avers that “Delawder had no agreement to commit a theft or robbery on the night in question,” and “Delawder did not participate in any theft or robbery on the night in question.” In the affidavit, Kersey also states he was the one involved in theft and robbery in 2009, not Delawder and that a year after Delawder was convicted, Kersey turned himself in and was also convicted on the same facts as Delawder.

{¶13} Accordingly, Appellant argued in his motion for leave that Delawder had no ability to obtain the information contained in Kersey’s affidavit because at the time of Appellant’s trial, Kersey was hiding. Thereafter, due to Appellant’s incarceration, he had no means of finding Kersey or obtaining his affidavit in order to file his motion within the time allotted by Crim.R. 33. Under these circumstances, Appellant argues that he was unavoidably prevented from obtaining

Kersey's affidavit, which he asserts is newly discovered evidence.

Appellant requests this court to find he acted within a reasonable time frame in filing his motion for leave.

{¶14} In response to both prongs of Appellant's delayed motion, Appellee asserts that Kersey's revelations are not newly discovered evidence. Further, Appellant's claim of newly discovered evidence is barred by the doctrine of res judicata. Appellee agrees with the trial court's findings and decision to deny the delayed motion for leave. For the reasons which follow, we agree with the trial court and Appellee.

{¶15} “ ‘[A] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.’ ” *Bennett, supra*, at ¶ 12, quoting *State v. Walden*, 19 Ohio App.3d 141, 146, 483 N.E.2d 859 (10th Dist.1984); *State v. Wilson*, 2nd Dist. Montgomery No. 23247, 2009–Ohio–7035, ¶ 8. “We note that ‘[t]here is a material difference between being unaware of certain information and being unavoidably prevented from discovering that information, even in the exercise of due diligence.’ ”

Lenoir at ¶ 24, quoting *State v. Warwick*, 2nd Dist. Champaign No. 01CA33, 2002–Ohio–3649. Accordingly, “a defendant fails to demonstrate that he or she was unavoidably prevented from discovering new evidence when he would have discovered that information earlier had he or she exercised due diligence and some effort.” *Id.*, citing *State v. Metcalf*, 2nd Dist.

Montgomery No. 26101, 2015–Ohio–3507, ¶ 11.

{¶16} Similarly, as to Appellant’s delayed motion for leave to file a post-conviction petition, “[A] defendant is ‘unavoidably prevented’ from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonable diligence, learned of their existence within the time specified for filing his petition for postconviction relief.” *Gavin, supra*, at ¶ 13, quoting, *State v. Cunningham*, 3rd Dist. Allen No. 1–15–61, 2016–Ohio–3106, ¶ 19, citing *State v. Holnapy*, 11th Dist. Lake No.2013–L–002, 2013–Ohio–4307, ¶ 32, and *State v. Roark*, 10th Dist. Franklin No. 15AP–142, 2015–Ohio–3206, ¶ 11.

{¶17} Appellant claims that the Kersey evidence was not presented at Appellant’s trial because Kersey was “hiding out.” This reasoning extends to Appellant’s inability to obtain the information necessary to provide in an affidavit to support a petition for post-conviction relief. In addition to hiding out before Appellant’s trial, Appellant and then Kersey later, were

incarcerated, further preventing Appellant from obtaining the information. Appellant argues that until Kersey was released from prison, Appellant's family had no practical way to obtain Kersey's affidavit to attach to the delayed motion.

{¶18} The trial court did not find the above argument persuasive. The trial court observed:

Kersey admits in his affidavit that he deliberately avoided Delawder and did everything he could to avoid being involved in Delawder's trial. Kersey also goes on to state that the Defendant had no knowledge of a plan to commit theft or robbery, had no agreement to do so, and did not participate in any theft or robbery on the night in question. Although such a statement would have arguably been helpful to Defendant at trial, the affidavit is silent and offers no explanation whatsoever for the seven- year delay from Delawder's conviction until this motion. There is no explanation offered for how the evidence being offered was in fact unknown to the Defendant at his trial or in the previous attempts for a new trial or post conviction relief. * * * And although Kersey admits he tried to avoid contact at the time of the trial, no explanation is offered about

the extensive delay all these years. Kersey's whereabouts were clearly known long ago as he in fact faced his own charges for the night in question and served a prison sentence for them. As such, the Defendant has offered no explanation whatsoever that he was unaware of this ground at the time of trial.¹

The trial court concluded:

Rather, by exercising his right to a trial, he put the State to their burden of proof as to all the elements of the crimes. He asserted his innocence, and Kersey's affidavit adds nothing to what Delawder claims to have known well before trial.² Nothing has changed other

1. The trial court also found that the Kersey evidence could have been raised in several of the post conviction filings made after Kersey was incarcerated and thus available to provide testimony. The court observed: "In April 2012 [Appellant] asked to file a delayed appeal which was denied. In July 2013 he once again asked to reopen his appeal, which was denied.* * * Shortly before, in March 2013, he filed a petition to vacate or set aside the judgment with this court. That petition was denied in June 2013. He appealed that decision as well, unsuccessfully."

2. Indeed, the trial transcript reflects that Kersey's participation in the night's events was well known to Appellant. Evidence that Appellant and Kersey were together at the bar is demonstrated throughout the testimonies of several individuals including the bartender, the decedent's friends Justin Preston, Kyle McCleese, and Officers Robinson and Hedrick, along with Appellant himself. Appellant and Officer Hedrick and Appellant's relatives who testified also placed Kersey in the house with Appellant when he was apprehended. There was evidence of jail phone calls between Appellant and Kersey after his arrest. Although Appellant's arguments herein are not made in the context of an ineffective assistance of counsel claim, it is generally held that a trial counsel's decision whether to call a particular witness falls within the rubric of trial strategy, and will not be second-guessed by a reviewing court. * * * " ' Even debatable trial tactics and strategies do not constitute ineffective assistance of counsel. * * * Trial counsel may have employed a reasonable trial strategy in this case by choosing not to call these potential alibi witnesses if, for example, counsel determined that the witnesses lacked credibility and would not assist the defense. * * * Indeed, unreliable witnesses can harm a defendant who offers their testimony in evidence.' " See *State v. McRae*, 3d Dist. Shelby No.17-17-23, 2018-Ohio-3435, quoting *State v. Fritz*, 3d Dist. Seneca No. 13-06-39, 2007-Ohio-3138, at ¶ 39. See also *State v. Walker*, 4th Dist. Ross No. 2001-Ohio-2660, at *4, (Defendant must overcome strong presumption that neither of two witnesses trial counsel opted not to call would have exonerated defendant.). It is not beyond the realm of possibility that at the time of Appellant's trial, he and his counsel may have elected not to locate Kersey and compel his testimony.

than Delawder now proffers a potential witness. * * * Though Kersey may have tried to avoid contact in February 2010, his location was clearly known afterwards. Delawder has offered no explanation whatsoever for the delay of years in offering Kersey's potential evidence. This Court finds that the years long delay in doing so was not reasonable and that the Defendant has delayed too long in seeking out Kersey and in seeking leave after discovering the evidence he claims warrants a new trial. * * * Likewise, the petition for post conviction relief also fails. The Defendant has offered no explanation to excuse his delay for filing beyond the statutory deadlines for such a petition.

{¶19} We agree with the trial court's decision that Appellant has failed to make the requisite showing that he was unavoidably prevented from discovering the Kersey evidence. As such, the trial court did not abuse its discretion in denying the first prong of the delayed motion and declining to grant a new trial. Furthermore, Appellant's petition is time-barred. As such, the trial court was without jurisdiction to entertain it and the petition should have been dismissed. See *State v. McManaway*, 4th Dist. Hocking No. 2016-Ohio-7470, at ¶ 16.

{¶20} The Kersey evidence is also barred under the doctrine of res judicata. In *State v. Wolke*, 4th Dist. Adams No. 17CA1048, 2018 Ohio-2119, at ¶ 10, quoting, *State v. Hamilton*, 4th Dist. Hocking No 16CA17, 2017-Ohio-1294, at ¶ 11, we explained:

“Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.” *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; see also *State v. Davis*, 139 Ohio St.3d 122, 2014–Ohio–1615, 9 N.E.3d 1031, ¶ 28.

“Res judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised.” *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016–Ohio–2756, ¶ 18, quoting *State v. Montgomery*, 2013–Ohio–4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).

{¶21} We agree with the trial court's conclusion that Appellant could have raised his ground of newly discovered evidence in any of his previous attempts to obtain postconviction relief.

CONCLUSION

{¶22} In our view, the trial court correctly analyzed Appellant's arguments. Appellant's arguments are generally barred by application of the doctrine of res judicata. As to the first assignment of error, Appellant does not explain how he was unaware of the so-called new evidence at the time of trial nor how he was unavoidably prevented from filing his motion for new trial, as he must have been aware or with reasonable diligence could have been aware of Kersey's knowledge and whereabouts. As such, the trial court did not abuse its discretion in overruling the delayed motion for new trial. We find no merit to Appellant's first assignment of error and affirm the trial court's judgment.

{¶23} As to the second assignment of error, Appellant's petition is also untimely, and Appellant has not explained how he was unavoidably prevented from having access to the evidence. As the trial court does not have jurisdiction to entertain an untimely postconviction petition, that portion of his motion should have been

dismissed. Thus, upon authority of App.R. 12(A)(1)(a), we modify the judgment appealed to reflect the dismissal of the delayed petition and we affirm the judgment of the trial court as modified.

JUDGMENT AFFIRMED AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED AS MODIFIED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.