[Cite as *State v. Brown*, 2018-Ohio-5128.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MILOUS BROWN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 17 MA 0140; 18 MA 0065

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 2009-CR 557; 09-CR 557

BEFORE:
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Milous Brown, pro se, Inmate No.: 603569, Belmont Correctional Institution, 68518 Bannock Road, St. Clairsville, Ohio 43950 address, for Defendant-Appellant.

Dated: November 30, 2018

Robb, P.J.

{¶1} Defendant-Appellant Milous Brown appeals the decision of the Mahoning County Common Pleas Court denying his Crim.R. 33 motion for a new trial based on newly discovered evidence and his petition for postconviction relief based on newly discovered evidence. In overruling both the motion and petition, the trial court found they were untimely and Appellant did not meet the threshold requirement to have the untimely motions decided on the merits. A review of the record indicates the trial court's decisions were correct. Thus, the trial court's judgments denying the motion and petition are affirmed.

Statement of the Facts and Case

{¶2} Appellant was indicted on two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (B), both third-degree felonies, and one count of rape in violation of R.C. 2907.02(A)(1)(b) and (B), a first-degree felony punishable by life imprisonment. The gross sexual imposition counts were severed from the rape count and the charges were tried separately.

{¶3} As to the rape charge, following a bench trial, Appellant was acquitted of rape, but found guilty of the lesser included offense of gross sexual imposition. Appellant appealed that decision and we affirmed the conviction. *State v. Brown*, 7th Dist. No. 12 MA 118, 2014-Ohio-4008 (*Brown II*). Appellant filed a postconviction petition concerning this conviction, which the trial court denied. *State v. Brown*, 7th Dist. No. 13 MA 176, 2014-Ohio-4008 (*Brown III*). This court affirmed the trial court's denial of the petition. *Id*. Appellant also filed a delayed application to reopen his appeal, which we denied. *State v. Brown*, 7th Dist. No. 12 MA 118, 2015-Ohio-793 (*Brown V*). Factually these cases concerned Appellant inappropriately touching a minor in a pool. *Brown II* at ¶ 4.

{¶4} As to the two gross sexual imposition charges, a jury found Appellant guilty of both counts and this court affirmed the convictions. *State v. Brown*, 7th Dist. No. 11 MA 117, 2013-Ohio-5528 (*Brown I*). Appellant filed a timely application to

reopen the appeal, which this court denied because Appellant failed to establish a colorable claim of ineffective assistance of appellate counsel. *State v. Brown*, 7th Dist. No. 11 MA 117, 2014-Ohio-4831 (*Brown IV*). Thereafter, Appellant filed a postconviction petition; the trial court denied the petition and this court affirmed the trial court's denial. *State v. Brown*, 7th Dist. No. 13 MA 175, 2015-Ohio-3957 (*Brown VI*). Factually these cases concerned inappropriate touching of two minor children, Child X and Child Y. *Brown I*. Child X is the child of Appellant's then girlfriend (now ex-girlfriend) with another man (referred to as father). *Brown I*. There was an ongoing custody dispute between the Appellant's girlfriend and the father regarding Child X. *Id*.

{¶5} On May 8, 2017, Appellant filed a request for a new trial on the two gross sexual imposition convictions. 5/8/17 Motion. The motion was brought under Crim.R. 33(A)(6), a claim of newly discovered evidence and asserted he was unavoidably prevented from discovering the alleged new evidence. 5/8/17 Motion. Appellant claimed he had anonymously received a call log from Mahoning County Children Services indicating that days prior to Child X and Child Y informing someone about the abuse, Child X's father called children services and stated Appellant was being charged with gross sexual imposition of a minor. 5/8/17 Motion. Appellant asserts this "new evidence" indicates the allegations of sexual abuse were fabricated by the father so that he could obtain custody of Child X. 5/8/17 Motion.

{¶6} The state opposed the motion asserting the motion was untimely and it failed to show by clear and convincing evidence Appellant was unavoidably prevented from discovering this alleged new evidence until more than six years after the convictions. 5/18/17 Opposition Motion. The state indicated the call log was unauthenticated and it was Appellant's theory at trial that the father of Child X put the minors up to giving false testimony. 5/18/17 Opposition Motion. The father was a witness at the trial and Appellant had the opportunity to challenge his testimony through cross-examination. 5/18/17 Opposition Motion. Therefore, Appellant was not unavoidably prevented from discovering this alleged new evidence and it was not new evidence. 5/18/17 Opposition Motion.

{¶7} Appellant filed a response to the motion in opposition. 6/6/17 Response.

{¶8} The trial court denied the Crim.R. 33 motion for new trial indicating Appellant was not unavoidably prevented from learning the existence of the "new evidence." It explained:

> The Defendant alleges he recently received an anonymous note containing a "call log" from Mahoning County Children Services. Defendant maintains the dates on the call log prove State's witnesses committed perjury.
>
> From the outset the Defendant has maintained that he was framed by [Child X's sister and father].
>
> [The father] testified at Defendant's trial and was subject to cross-examination. Defendant, then, had the opportunity to support his theory that [the father] got the girls to testify against him.
>
> The court finds that Defendant has not demonstrated by clear and convincing evidence that he was unavoidably detained from obtaining the "call log." He was furnished with counsel through his trial and subsequent appeal and had the opportunity to challenge the testimony and thus could have learned of the existence of the log.

6/7/17 J.E.

{¶9} Appellant appealed the decision in October 2017 and asked this court for permission to file a delayed appeal. 10/6/17 Notice of Appeal; 10/6/17 Motion for Delayed Appeal. We granted the request because the docket indicated Appellant was not served the June 7, 2017 judgment. 12/4/17 J.E.

{¶10} In April 2018, Appellant filed a postconviction petition setting forth similar arguments to the ones made in the Crim.R. 33 motion for a new trial. 4/16/18 Postconviction Petition. The petition referenced the call log from Mahoning County Children Services that Appellant received anonymously. Attached to the petition was a letter from Mahoning County Children Services indicating it could not authenticate the call log and it appeared to only be a minute portion of the record and had extraneous

information that was not contained in the Mahoning County Children Services file. 4/16/18 Postconviction Petition, Exhibit A.

{¶11} The state filed a motion for judgment on the pleadings asserting the petition was untimely and there was no explanation for the delay; the petition did not show Appellant was unavoidably prevented from discovering the call logs which he relied on for his claim of relief. 4/26/18 Motion for Judgment on the Pleadings.

{¶12} The trial court overruled the postconviction relief petition. 4/30/18 J.E.

{¶13} Appellant appealed the decision on June 5, 2018. 6/5/18 Notice of Appeal. The docket indicates the April 30, 2018 decision was not mailed to Appellant until May 7, 2018. Therefore, Appellant's June 5, 2018 Notice of Appeal was timely.

{¶14} The state requested, due to the similar nature of the appeals, for this court to consolidate the appeal from the denial of the Crim.R. 33 motion with the appeal from the denial of the postconviction petition. 6/15/18 State's Motion. We granted the request and consolidated the appeals. 6/26/18 J.E.

Assignment of Error Pertaining to Crim.R. 33

"The Mahoning County Court of Common Pleas violated Appellant's rights to due process by dismissing his motion for leave to file motion for new trial on June 7, 2017."

{¶15} Appellant's Motion for new trial was based on newly discovered evidence. Crim.R. 33 states:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing

> of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.
>
> (B) Motion for New Trial; Form, Time. * * *
>
> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed 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.

{¶16} Therefore, the motion for new trial was required to be filed within 120 days of the jury's verdict or within 7 days after the trial court found Appellant was unavoidably prevented from discovering the evidence within 120 days of the verdict. Appellant acknowledged his motion was not filed within 120 days and requested an unavoidably prevented determination. The trial court concluded he was not unavoidably prevented from discovering the evidence. Appellant argues that decision is incorrect.

{¶17} The decision of whether to grant a motion for new trial rests within the sound discretion of the trial court. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus; *State v. Williams*, 43 Ohio St.2d 88, 330 N.E.2d 891 (1975), paragraph two of the syllabus (newly discovered evidence). An appellate court reviews a trial court's determination of a Crim.R. 33 motion under an abuse of discretion standard. *Schiebel*. An abuse of discretion implies that the trial court's decision was "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶18} The Eighth Appellate District has stated that a party is "unavoidably prevented" from discovering the new evidence if the party had no knowledge of the

existence of newly claimed evidence and could not have learned of its existence within the time prescribed by the rule with the exercise of reasonable diligence. *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 27 (8th Dist.).

{¶19} Here, the record indicates a court order made the Children Services Records available for in camera inspection. 4/16/18 Postconviction Petition, Exhibit C. Furthermore, as the trial court noted, Appellant's defense was that he was framed by the father. Our decision in the direct appeal clearly indicated this was the theory Appellant presented to the jury. *State v. Brown*, 7th Dist. No. 11 MA 117, 2013-Ohio-5528, ¶ 14-15 (*Brown I*) ("Appellant had every opportunity to advance his theory that Child X's father created and manipulated the situation to further his goal of obtaining custody of Child X, and the jury heard that theory, beginning with opening statements, though the case. * * * Instead, Appellant contends that the jury should have disregarded that evidence because Child X's father * * * sought and obtained the change of custody he desired only after he learned that Appellant was sexually abusing the child in their mother's household. Appellant attempted to convince the jury that he was an innocent victim of this 'plot' by [the father] to get custody of Child X."). The father was a witness at trial and Appellant had the opportunity to cross-examine him. Accordingly, given the defense and the record, the trial court did not abuse its discretion in concluding Appellant was not unavoidably prevented from discovering this alleged new evidence.

{¶20} This assignment of error is meritless.

Assignment of Error Pertaining to PCP

"Defendant-Appellant had his Petition for Post-Conviction dismissed resulting in a violation of his rights guaranteed by the Due Process Clause in the U.S. Constitution."

{¶21} The postconviction petition filed in this case is Appellant's second postconviction petition. His first petition was filed in 2012. *State v. Brown*, 7th Dist. No. 13 MA 175, 2015-Ohio-3957, ¶ 4 (*Brown VI*). In *Brown VI* we affirmed the trial court's dismissal of the petition, but stated that it should have been dismissed as untimely and not properly filed. *Id*. at ¶ 1.

{¶22} The instant petition was filed almost seven years after Appellant's conviction for two counts of gross sexual imposition. This is untimely under both the current and prior version of R.C. 2953.21 (Prior version, which was effective at the time

of his conviction, stated a postconviction petition had to be filed within 180 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." The current version states a postconviction petition has to be filed within 365 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.").

{¶23} R.C. 2953.23(A)(1) authorizes a trial court to address the merits of an untimely filed petition for postconviction relief only if both of the following apply:

> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

R.C. 2953.23.

{¶24} Similar to the motion for a new trial, Appellant claims his newly discovered evidence is the call log from Mahoning County Children Services that he received anonymously. He claims he was unavoidably prevented from discovering these facts which support his theory that he was framed.

{¶25} A trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 will be upheld absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

{¶26} Appellant was not unavoidably prevented from discovering this alleged call log. As explained above, the record indicates the Children Services Records were available for in camera inspection. 4/16/18 Postconviction Petition, Exhibit C. Furthermore, Appellant's defense was that he was framed by the father of Child X. In *Brown I*, we stated:

> Appellant had every opportunity to advance his theory that Child X's father created and manipulated the situation to further his goal of obtaining custody of Child X, and the jury heard that theory, beginning with opening statements, throughout the case.
>
> * * *
>
> Instead, Appellant contends that the jury should have disregarded that evidence because Child X's father * * * sought and obtained the change of custody he desired only after he learned that Appellant was sexually abusing the child in their mother's household. Appellant attempted to convince the jury that he was an innocent victim of this "plot" by [the father] to get custody of Child X.

Brown I, 2013-Ohio-5528, at ¶ 14-15.

{¶27} We recited that same analysis when we overruled Appellant's second proposed assignment of error in his application to reopen. *Brown IV*, 2014-Ohio-4831, ¶ 10. The father was a witness at trial, he was cross-examined and Appellant tried to advance his theory that he was set up by the father of Child X. The alleged Children Services call logs which would support that theory could have been used to discredit the father and show Appellant was framed. They were not used and after hearing all the other evidence including testimony from Child X, the jury did not agree with Appellant's theory. Accordingly, the postconviction petition fails for the same reason the Crim.R. 33 motion for new trial failed; given the defense and the record, the trial court did not abuse its discretion in concluding Appellant was not unavoidably prevented from discovering this alleged new evidence.

{¶28} This assignment of error is meritless.

Conclusion

{¶29} The decisions to deny the untimely Crim.R. 33 motion and postconviction petition are affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.