[Cite as *State v. Kilbane*, 2018-Ohio-1848.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106063 and 106064

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

OWEN J. KILBANE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-76-029398-A and CR-76-029398-B

BEFORE: Laster Mays, J., Boyle, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 10, 2018

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ANITA LASTER MAYS, J.:

{¶1} Defendants-appellants Owen J. Kilbane ("Owen") and Martin A. Kilbane ("Martin")[1] file this consolidated appeal challenging the trial court's denial of their motion for leave to file a motion for a new trial pursuant to Ohio Crim.R. 33. This court granted appellants' motion to file a delayed appeal. After a review of the record, we affirm the decision of the trial court.

I. Background and Facts

{¶2} Appellants were convicted by jury on April 11, 1977, for the much-publicized murder-for-hire killing of Marlene Steele ("Marlene") in 1969, solicited by her husband Robert Steele ("Steele") during his term as judge of the Euclid Municipal Court. Appellants were implicated by Richard Robbins ("Robbins"), who was allegedly contacted by Martin to execute Marlene.

{¶3} After several meetings, it was determined that a signal would be received from Steele and Martin would drive Robbins to the Steele's home. While Marlene slept, Robbins entered the home and shot her twice in the head. Martin picked up Robbins, returned to appellants' home, and notified Steele that he could call the police. Robbins was paid $1,000 for the murder of Marlene. In 1975, an individual named C.B. implicated appellants, Robbins and Steele.

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[1] *See* sua sponte order no. 509205 (Aug. 3, 2017): 8th Dist. Cuyahoga Nos. 106063 and 106064 are consolidated for hearing and disposition.

{¶4} Robbins agreed to testify against appellants in exchange for immunity. Robbins and appellants were tried together and found guilty of first- degree murder. This court affirmed the decision in *State v. Kilbane*, 8th Dist. Cuyahoga Nos. 38428, 38383, and 38433, 1979 Ohio App. LEXIS 10550 (July 3, 1979). Jurisdiction was declined by the Ohio Supreme Court.

{¶5} The Sixth Circuit reversed the grant of appellants' petition for writ of habeas corpus by the United States District Court for the Northern District of Ohio on the admissibility of a witness statement that refused to testify. *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir.1982), *writ denied, Kilbane v. Marshall*, 460 U.S. 1053, 103 S.Ct. 1501, 103 S.Ct. 1502, 75 L.Ed.2d 932 (1983), *rehearing denied*, *Kilbane v. Marshall*, 461 U.S. 940, 103 S.Ct. 2113, 103 S.Ct. 2114, 77 L.Ed.2d 316 (1983).

{¶6} On November 21, 2014, appellants filed a "motion for leave to file a motion for a new trial based on newly discovered evidence or in the alternative, petition for postconviction relief" pursuant to Crim.R. 33.[2] The facts supporting appellants' motion are as follows: on August 21, 1977, the Cleveland Plain Dealer newspaper published an article written by James Cox ("Cox") entitled "Murder, the Verdict in Balance."[3] Cox interviewed several jurors that served on the Steele case.

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[2] Appellants initially cited R.C. 2953.21 for postconviction relief as grounds in their trial court motion but have not advanced that argument on appeal.

[3] Cox, *Murder, the Verdict in Balance*, Cleveland Plain Dealer (Aug. 21, 1977).

{¶7} Appellants have consistently maintained that they were not guilty in the Steele case, which turned on the testimony of codefendant Robbins. Robbins could not testify unequivocally what position Marlene was in when she was shot. The article revealed that the jurors conducted experiments during deliberations to determine whether the testimony by Robbins was supported by the experiment results. Appellants argue that these activities constituted a "colorable claim of external influences on the jury." Appellants' brief (Oct. 3, 2017), pg. 3. Affidavits attached to the motion aver that neither appellants nor defense counsel knew of the article until a daughter of one of the counsel discovered it in July 2014.

{¶8} The state filed a motion in opposition instanter on July 18, 2016. On March 13, 2017, the trial court denied the motion without a hearing, finding that appellants failed to demonstrate by clear and convincing evidence that they were unable to timely discover the Cleveland Plain Dealer article regarding the alleged juror misconduct. We granted leave to appeal.

II. Assignments of Error

{¶9} Appellants present two assigned errors for our review:

> I. The trial court erred as a matter of law in failing to investigate a colorable claim of external influences on the jury that violated the appellants' Fifth Amendment right to a trial by a fair and impartial jury, which failure violated appellants' right to Due Process and Equal Protection of the laws.
>
> II. The trial court erred and abused its discretion in refusing to conduct a hearing on the issue as to whether the appellants were unavoidably prevented from discovering the evidence within 120 days of the verdict.

III. Discussion

A. Motion for New Trial Under Crim.R. 33

{¶10} "[T]he decision to grant or deny" a Crim.R. 33 motion "is within the sound discretion of the trial court." *State v. Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, ¶ 7, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002- Ohio-2128, 767 N.E.2d 166, ¶ 82. The trial court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus. That is, both aspects of a Crim.R. 33 permission for leave to file a motion for a new trial and the court's ruling on the motion are reviewed under the abuse of discretion standard. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). *State v. Abdul*, 8th Dist. Cuyahoga No. 103510, 2016-Ohio-3063, ¶ 9. The ruling must be "unreasonable, arbitrary, or unconscionable" to constitute an abuse of discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} To obtain leave, Crim.R. 33(B) requires that the defendant demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence within the 120-day time period. *State v. Mathis*, 134 Ohio App.3d 77, 79, 730 N.E.2d 410 (1st Dist.1999). If the 120-day time period has expired, the defendant must seek leave of the trial court to file a delayed motion for a new trial. *Id. State v. Dues*, 8th Dist. Cuyahoga No. 105388, 2017-Ohio-6983, ¶ 10.

{¶12} "'[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 * * *'

'and could not have learned of that existence within the time prescribed for filing the motion * * *' ' in the exercise of reasonable diligence.'" *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 13, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). *Dues* at ¶ 11.

{¶13} Crim.R. 33(A) provides that a defendant may be granted a new trial upon motion where one of the listed factors exist and that factor materially affects the defendant's substantial rights. Appellants cite misconduct of the jury that falls under Crim.R. 33(A)(2), the motion for which must be filed within 14 days after the verdict unless it is demonstrated by clear and convincing evidence that the "defendant was unavoidably prevented from filing the motion." Crim.R. 33(B).

{¶14} Appellants also offer, pursuant to Crim.R. 33(A)(6), that the evidence is newly discovered, is material to the defense, and could not have been discovered with reasonable diligence:

> 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.

(Emphasis added.) Crim.R. 33(B).

{¶15} Crim.R. 33(E) adds that a new trial may not be granted, verdict set aside, or judgment of conviction be reversed for any cause "unless it affirmatively appears from

the record that the defendant was prejudiced thereby or was prevented from having a fair trial." *Id*.

{¶16} As to form, Crim.R. 33(C) requires that the motion be accompanied by affidavits. Appellants submitted affidavits advising that: (1) they learned of the article from an attorney in June 2014, (2) they conducted legal research that indicated that the conduct of the jury may entitle them to a new trial, (3) they contacted their friend J.C. and asked to secure and forward copies of the article, and (4) J.C.'s daughter located the article that was provided to them. Appellants averred that neither they, nor their defense counsel, knew of the article prior to the notice from that attorney. Appellants also attached affidavits by J.C. and his daughter confirming appellants's averments as well as a copy of the article.

{¶17} Significantly, appellants argue that they were not able to discover the information within the 14- and 120-day time limits. The jury's verdict was rendered on April 11, 1977. The article was published on August 21, 1977, more than 120 days after the verdict. Thus, appellants have established that the information was not available within 120 days from the date of the verdict because it had not yet been published.

{¶18} The date of publication is 132 days after the verdict. While a 12-day difference may, if meeting the other Crim.R. 33 elements, require due consideration, the article in this case was discovered and the Crim.R. 33 motion was filed approximately 37 years after the article was published. A newspaper article is a public document that becomes available upon publication. It is the "duty of the appellant to secure a copy of

this article within a reasonable time thereafter." *State v. Richard*, 8th Dist. Cuyahoga No. 80428, 2002-Ohio-5959, ¶ 22, citing *State v. Shepard*, 13 Ohio App.3d 117, 468 N.E.2d 380 (2d Dist.1983).

{¶19} We find that a 37-year delay is unreasonable.

> The essence of Crim.R. 33 is that collateral attacks on the validity of trial proceedings must be made close in time to the proceeding to ensure that any issue raised may be given full and fair consideration. The rule equally protects both the finality of verdicts and principles of judicial economy. Delays in presenting evidence once discovered undermine the 'overall objective of the criminal rules in providing the speedy and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable delay.'"

State v. Barnes, 12th Dist. Clermont No. CA99-06-057, 1999 Ohio App. LEXIS 6421 (Dec. 30, 1999).

{¶20} In addition, the inquiry is not complete because Crim.R. 33(A) also requires that appellant demonstrate that the new information "materially" affects the defendant's "substantial rights." *See also* Crim.R. 33(E)(5), "no motion for a new trial shall be granted" "unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial." *Id*.; *State v. Greer*, 8th Dist. Cuyahoga No. 91983, 2009-Ohio-4228, ¶ 65.

{¶21} The jury allegedly reenacted the shooting to determine whether Robbins's description of the placement of Marlene's body at the time of the shooting was accurate. Appellants advance no evidence or on-point case law supporting their position that the jurors' activities in the jury room were inappropriate and improperly used to determine guilt, infringed upon appellants' constitutional right to a fair trial and that, but for the

jury's actions, a strong probability exists that the outcome of the case would have been different.

{¶22} Appellants are correct that a jury must be free of extrinsic influences and must limit consideration "to the evidence, arguments and law presented in open court." *State v. Hubbard*, 8th Dist. Cuyahoga No. 92033, 2009-Ohio-5817, ¶ 14, citing *State v. Spencer*, 118 Ohio App.3d 871, 873-874, 694 N.E.2d 161 (8th Dist.1997); *State v. King*, 10 Ohio App.3d 161, 165, 460 N.E.2d 1383 (1st Dist.1983). It is also true that even where juror misconduct is present, the conduct "'must be prejudicial.'" *Id*. at ¶ 14, quoting *King*.

{¶23} Conducting an out-of-court experiment is an "'example of extraneous influence.'" *Fletcher v. McKee*, 355 Fed.Appx. 935 (6th Cir.2009), quoting *Garcia v. Andrews*, 488 F.3d 370, 376 (6th Cir.2007). The Sixth Circuit has distinguished external experiments from those conducted during internal jury deliberations:

> After examining numerous cases involving jury experiments similar to the one at issue here, the district court determined that "Petitioner's case is more like [cases in which jury experiments were not found unconstitutional] than *Doan* [*v. Brigano*], 237 F.3d 722, 733, fn.7 (6th Cir. 2001). The jurors in this case conducted their experiment in the jury room with all the deliberating jurors present. The jurors used a gun that was admitted in evidence, and they relied on testimony regarding the likely momentum and location of the gun if [the victim] had fired it. The experiment was part of the private, internal deliberations of the jury." * * *
>
> The district court's decision that the reenactment of [the victim's] shooting "was part of the private, internal deliberations of the jury" was not improper.

Id. at 939, citing *Fletcher v. McKee,* E.D.Mich. No. 05-74659, 2008 U.S. Dist. LEXIS 3535, *18 (Jan. 17, 2008).

{¶24} In this case, there is no evidence that the jurors used external information in their deliberations. The evidence reveals that the jurors used evidence that was submitted by the trial court to conduct their experiments. Additionally, the record reveals that the experiments conducted were part of their private internal deliberations and therefore, were not improper.

{¶25} We also add that "'[t]he stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result.'" *State v. Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, at ¶13, quoting *State v. Gillispie*, 2d Dist. Montgomery No. 24456, 2012-Ohio-1656, ¶ 35.

{¶26} Further to the question of prejudice to appellants' rights, considerable evidence was introduced at trial supporting the jury's verdict as we summarized in our decision on appellants' direct appeal. *Kilbane*, 8th Dist. Cuyahoga Nos. 38428, 38383, and 38433, 1979 Ohio App. LEXIS 10550 (July 3, 1979). *See also Steele*, 684 F.2d 1193 (postconviction petition decision):

> The state's evidence at the trial was strong. The motive was clearly established. A lawyer friend of Steele, David Lombardo, a man with no apparent motive to lie, testified that Steele told him three months before the murder that he was thinking about finding someone to kill his wife. Robbins testified that he was hired by the Kilbane brothers acting for Steele. He testified concerning the details of the crime and how he was contacted and paid. He testified that he did not meet Steele until sometime after the murder. The only reference to the murder that ever passed

between them came on one occasion when Steele winked at him and said simply "Good job."

Id. at 1198.

{¶27} We find that the new evidence: (1) does not disclose "a strong probability that it will change the result if a new trial is granted," (2) is not material to the issues, and (3) is "merely cumulative to former evidence." *Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, ¶ 13, quoting *State v. Barnes*, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶28} The trial court did not abuse its discretion when appellants' motion for leave to file a motion for a new trial was denied. The first assignment of error is overruled.

B. Evidentiary Hearing

{¶29} Our finding on the first assignment of error is also determinative of the trial court's denial of appellants' request for an evidentiary hearing. The failure of the evidence to meet the cited factors in *Williams* also supports the trial court's decision that a hearing is not warranted. *Williams* at ¶ 13, 18.

{¶30} Appellants' second assignment of error is overruled.

{¶31} The trial court's judgment is affirmed.

It is ordered that the appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR