[Cite as *State v. Trimble*, 2015-Ohio-942.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-P-0088**
- vs -	:	
JAMES E. TRIMBLE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas.
Case No. 2005 CR 00022.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Kathryn L. Sandford, Office of the Ohio Public Defender, Supervisor, Death Penalty Division, 250 East Broad Street, Suite 1400, Columbus, OH 43215; *Joseph E. Wilhelm*, Assistant Federal Public Defender, Capital Habeas Unit, Skylight Office Tower, 1660 West Second Street, Suite 750, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, James E. Trimble, appeals from the October 8, 2013 judgment order of the Portage County Court of Common Pleas, overruling his motion for leave to file a motion for new trial. For the reasons that follow, the judgment of the trial court is reversed and remanded.

{¶2} On January 21, 2005, appellant, armed with an assault rifle, murdered his girlfriend, Renee Bauer, and her seven-year-old son at the couple's home in Ravenna, Ohio. Appellant then fled through a wooded area in his neighborhood. At around 11:30 p.m., appellant broke through a patio door at the home of Kent State University student Sarah Positano. Appellant took Ms. Positano hostage and ordered her to call the police. The hostage situation ended when appellant murdered Ms. Positano. In the morning of January 22, 2005, appellant was taken into custody by SWAT officers.

{¶3} On October 25, 2005, appellant was found guilty by a jury of three counts of aggravated murder and accompanying specifications, three counts of kidnapping, one count of aggravated burglary, and two counts of felonious assault. The jury recommended the death sentence be imposed on appellant, and on November 8, 2005, the trial court sentenced appellant to death for the aggravated murders of Renee Bauer, her son, and Sarah Positano. Appellant's sentence was affirmed on direct appeal by the Ohio Supreme Court. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961 (2009).

{¶4} While his direct appeal was pending, appellant filed a petition for postconviction relief on May 27, 2007. The trial court denied appellant's petition. This court affirmed the trial court's decision in *State v. Trimble*, 11th Dist. Portage No. 2007-P-0098, 2008-Ohio-6409.

{¶5} Over five years later, on August 29, 2013, appellant filed the instant "Motion for Leave to File New Trial Motion." His motion for leave was accompanied by a memorandum in support. Attached to appellant's memorandum in support were two e-mails and a response to a public records request. The first e-mail was dated

December 31, 2012. It was sent by former Portage County Deputy Sheriff Michael Muldowney to Dennis Day Lager, Chief of Portage County Public Defender's Office. The e-mail stated:

> [O]n or about October/November 2005/2006, I learned that a Rogue SWAT Officer was in Sara Positano duplex during the 2hr cool off period.
>
> On or about October/November, of 2005/2006, I communicated what I learned and my concerns to then, Chief David Doak, of the Portage County Sheriff Office.
>
> Approximately 3 years later, on or about, January 2009, I had a second conversation with Dave Doak as Portage County's newly elected Sheriff—reference the rogue officer * * *.
>
> To date, I have no information on whether the information I passed on to Dave Doak went anywhere. I am reaching out to you—to make sure certain information about the Trimble case are known, so Justice can be served.

{¶6} The second e-mail attached to appellant's memorandum in support was dated July 15, 2013, and sent by Mr. Muldowney to Mark Rooks of the Office of the Ohio Public Defender. That e-mail stated:

> I [Michael Muldowney] have reached out the best way I can to the County and Ohio Public Defenders Office with my e-mail—reference the Trimble case. Please let the Lawyers know that I want to move forward and be part of the process but I cannot move forward without receiving a subpoena first etc.

{¶7} Appellant's memorandum argued that he did not purposely cause Ms. Positano's death. Instead, appellant asserts the presence of law enforcement officers inside the residence caused appellant to accidentally shoot Ms. Positano. Appellant argues that "this new evidence impeaches prosecution witnesses who claimed that law enforcement did not enter Positano's house during the standoff."

{¶8} Appellee, the state of Ohio, filed a response to appellant's motion for leave, arguing that appellant failed to show by clear and convincing evidence he was unavoidably prevented from discovering the evidence he seeks to introduce for a new trial. Appellee also argued that had appellant included an affidavit in support of his motion, the affidavit would have been inadmissible hearsay. Appellant then filed a reply to appellee's response.

{¶9} On October 8, 2013, the trial court overruled appellant's motion for leave. As the reason for overruling appellant's motion for leave, the trial court's judgment entry stated the following:

> An e-mail sent by Michael Muldowney does not constitute evidence sufficient to grant a motion for leave to file notice for a new trial for newly discovered evidence. At a minimum, an affidavit is needed. See, *State versus Gilcreast*, (Ohio App. 9 Dist.), 2003-Ohio-7177; *State versus Williams*, (Ohio App. 2 Dist.), 2004-Ohio-3135.

{¶10} Appellant timely appeals the trial court's judgment entry overruling his motion for leave. On appeal, appellant sets forth two assignments of error.

{¶11} In his first assignment of error, appellant argues:

> The trial court abused its discretion and violated appellant's due process rights, when it denied appellant's [motion for leave] by requiring appellant to support that motion with an affidavit, by not holding a hearing on that motion, and when it denied appellant a fair mechanism to develop facts to support the motion for leave.

{¶12} This court has previously explained the mechanics of Crim.R. 33 in *State v. Elersic*, 11th Dist. Geauga No. 2006-G-2740, 2007-Ohio-3371. In that case, we stated:

> The foregoing rule anticipates a two-step process where the motion for new trial is made outside the permissible timeframe for filing the motion. First, the trial court must find the party was unavoidably prevented from filing his motion within the prescribed window set

> forth in Crim.R. 33(B). The party must then file his or her motion within seven days of the trial court's determination. 'Crim.R. 33 does not specify the procedure by which the initial order is to be obtained.'

Id. at ¶23 (citations omitted). A trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay. *State v. Stevens*, 2d Dist. Montgomery Nos. 23236 & 23315, 2010-Ohio-556, ¶11.

{¶13} Crim.R. 33(B) provides that a motion for new trial upon the ground of newly discovered evidence must be filed within 120 days after the verdict was rendered unless "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" within the 120-day period.

{¶14} "The standard of 'clear and convincing evidence' is defined as '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 v. Schiebel*, 55 Ohio St.3d 71, 74 (1990), citing *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

> **{¶15}** Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof. However, it is also firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge.

Id. (citations omitted).

{¶16} When a motion for leave to file a motion for new trial is filed, the trial court has three options. First, if it determines that the documents in support of the motion on their face do not demonstrate that the movant was unavoidably prevented from discovering the evidence, it may either overrule the motion or hold a hearing. *See State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶19 (2d Dist.) ("a trial court has discretion when deciding whether to grant leave to file a motion for a new trial, or whether to hold a hearing on the issue"). Second, if the trial court determines that the documents submitted clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, the court must grant the motion for leave and allow the motion for new trial to be filed. *See* Crim.R. 33(B). Third, if the trial court determines the documents on their face "support [the movant's] claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there * * * is clear and convincing proof of unavoidable delay." *State v. York*, 2d Dist. Greene No. 99-CA-54, 2000 Ohio App. LEXIS 550, *3 (Feb. 18, 2000), citing *State v. Wright*, 67 Ohio App.3d 827, 828 (1990); *see also State v. Rice*, 11th Dist. Ashtabula No. 2012-A-0062, 2014-Ohio-4285, ¶14.

{¶17} To begin, we note that the jury verdict in this case was rendered on October 25, 2005. Appellant did not file his motion for new trial until August 29, 2013, significantly beyond the 120-day prescribed time period. As such, appellant was required to make a showing by clear and convincing proof that he was unavoidably prevented from discovering this evidence. *See* Crim.R. 33(B).

{¶18} Here, the trial court overruled appellant's motion for leave to file a motion for a new trial without a hearing and without making any determination as to the timeliness of appellant's motion. Instead, the trial court overruled appellant's motion because insufficient evidence was offered in support of his motion. Specifically, the trial court overruled appellant's motion for leave because, "[a]t a minimum, an affidavit is needed." Pursuant to the Crim.R. 33 procedures discussed above, no affidavit is required to support the motion for leave to file a motion for new trial. The trial court's judgment entry makes no mention of whether it found that appellant was "unavoidably prevented" from discovering the "newly discovered" evidence. This is the threshold determination that must be made. Without this finding, we are left with an insufficient record to review. If appellant submitted documents that, on their face, support the claim that he was unavoidably prevented from filing a timely motion but more information is necessary to determine whether he met his burden, the trial court must hold a hearing to determine whether appellant can establish unavoidable delay by clear and convincing proof. *York*, *supra*, at *3-4. If the trial court finds by clear and convincing proof that appellant was unavoidably delayed, then appellant shall have seven days from that finding to file his delayed motion for new trial and support it with the requisite evidentiary quality material in support. Crim.R. 33(B).

{¶19} In addition, we note the trial court would only need to consider whether the evidence is, in fact, "newly discovered" if it finds that appellant "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. Alexander,* 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468,

¶17, citing *State v. Walden*, 19 Ohio App.3d 141, 145-146 (10th Dist.1984) (defining "unavoidably prevented"); *see also State v. Lake*, 5th Dist. Richland No. 2010 CA 88, 2011-Ohio-261, ¶37. Appellant essentially contends the newly discovered evidence will corroborate his contention that a SWAT officer was in the house at the time of Ms. Positano's murder, and this somehow caused appellant to accidentally discharge his weapon. This is a theory he was aware of, and indeed advanced, at his trial.

{¶20} Appellant's first assignment of error has merit.

{¶21} In his second assignment of error, appellant asserts:

> Appellant's due process right to a fair trial was denied when the state suppressed favorable evidence about the presence of law enforcement inside Sarah Positano's residence and when it failed to correct false testimony about the lack of any law enforcement officers inside that residence.

{¶22} Appellant's second assignment of error argues appellee's failure to disclose material evidence or correct false testimony violated appellant's due process rights. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963). "*Brady* holds that a prosecutor violates due process when he (1) suppresses evidence (2) that is favorable to the defendant, when that evidence (3) is material to guilt or innocence." *United States v. Olsen*, 737 F.3d 625, 628 (9th Cir.2013) (Kozinski, C.J., dissenting), citing *Brady, supra* at 87. The same due process violation occurs when the prosecution suppresses evidence that bears upon the credibility of a government witness. *Giglio v. United States,* 405 U.S. 150, 153-54 (1972).

{¶23} Additionally, "prosecutors have 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *State v. Sanders*, 92 Ohio St.3d 245, 261 (2001), quoting *Kyles v. Whitley*, 514

U.S. 419, 437 (1995). "'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation'" for purposes of determining whether a *Brady* violation occurred. *State v. Iacona*, 93 Ohio St.3d 83, 92 (2001), quoting *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir.1995).

{¶24} On appeal, appellant argues that appellee suppressed evidence related to Muldowney's e-mail regarding the presence of a rogue law enforcement officer in Ms. Positano's residence. Appellant argues Muldowney's e-mail is favorable to appellant because it creates an issue of fact as to the mens rea element of the aggravated murder charge involving Ms. Positano. As previously stated, Muldowney's e-mail states, in part, that "[o]n or about October/November, of 2005/2006, I communicated what I learned and my concerns [about the presence of a rogue SWAT officer in Positano's home] to then, Chief David Doak, of the Portage County Sheriff Office."

{¶25} In this case, the assignment of error assumes the existence of facts that are not in the record. Whether or not the conversations alluded to in the e-mails actually took place, and whether those conversations had any relevance to the case is, at this point in time, unresolved. Any claim that appellee withheld any evidence is purely speculative. *See State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶60. Therefore, appellant has not met his burden to establish there was any sort of *Brady* violation. *See State v. Moore*, 10th Dist. Franklin Nos. 11AP-1116 & 11AP-1117, 2013 Ohio App. LEXIS 3439, *22-23 (Aug. 1, 2013). Accordingly, appellant's second assignment of error is without merit.

{¶26} For the reasons stated above, the judgment of the Portage County Court of Common Pleas is reversed and remanded. On remand, if the trial court determines

the documents on their face "support [the movant's] claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there * * * is clear and convincing proof of unavoidable delay." *See York*, *supra*, at *3. If, however, the trial court finds that the documents clearly and convincingly demonstrate on their face that appellant was prevented from discovering the evidence upon which the motion for new trial would be based, appellant must be afforded seven days to file a delayed motion for a new trial. Crim.R. 33(B).

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶27} The majority reverses and remands the decision of the lower court for its purported failure to make the threshold determination "of whether it found that appellant was 'unavoidably prevented' from discovering the 'newly discovered' evidence." *Supra* at ¶ 18. Without the benefit of the trial court's finding, the majority maintains there is "an insufficient record to review." This view misconstrues the role and function of the appellate courts.

{¶28} A fundamental tenet of appellate review is that "[r]eviewing courts affirm and reverse judgments, not reasons." (Citation omitted.) *State v. Eschenauer*, 11th Dist. Lake No. 12-237, 1988 Ohio App. LEXIS 4479, 8 (Nov. 10, 1988); *Mizer v. Smith*, 5th Dist. Licking No. 09-CA-00026, 2009-Ohio-6820, ¶ 20 ("[i]t is a fundamental rule of appellate review that we review judgments, not reasons").

{¶29} "[I]t is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof." *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 222, 631 N.E.2d 150 (1994) ("a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof").

{¶30} The evidence on which the trial court based its decision to deny Trimble leave to file an untimely motion for new trial is the same evidence in the record before this court. The trial court's "finding" based on this evidence neither contributes to nor detracts from the record before this court. There is simply no impediment to this court performing its role as a reviewing court to decide whether the trial court abused its discretion in denying Trimble leave. *Geneva v. Fende*, 11th Dist. Ashtabula No. 2009-A-0023, 2009-Ohio-6380, ¶ 33 ("[i]t is the duty of the reviewing court to affirm the judgment if it can be supported on any theory, although a different theory from that of the trial court") (citation omitted).

{¶31} In the present case, the trial court did state its reasons, albeit succinctly, for denying Trimble leave: "[a]n email sent by Michael Muldowney does not constitute evidence sufficient to grant a motion for leave to file notice for a new trial for newly discovered evidence." It is difficult not to agree with this conclusion.

{¶32} Trimble's newly discovered evidence consists of an unsworn email by a former Portage County Deputy Sheriff (Muldowney) with no apparent connection at all to the events of Trimble's case. In the email, Muldowney claims that, "on or about

October/November 2005/2006, I learned that a Rogue Swat Officer was in Sara Positano's duplex during the 2hr cool off period," and "I communicated what I learned * * * to then, Chief David Doak, of the Portage County Sheriff Office." Notably, Muldowney does not identify the source of this information and is unwilling to attest the statements in the email without the issuance of a subpoena. In opposition, the State submitted the sworn testimony of Chief Deputy Doak that "I have no recollection of a conversation with Michael Muldowney."

{¶33} Trimble's burden under Criminal Rule 33(B) was to demonstrate "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely." The documents attached to Trimble's motion for leave fail to meet this burden. Without any explanation of the source of Muldowney's information or the circumstances in which he acquired it, it is impossible to determine whether Trimble was unavoidably prevented from its discovery.

{¶34} The majority may disagree with the trial court's statement that, "at a minimum, an affidavit is needed," but that does not render the trial court's judgment unreasonable or arbitrary, i.e., an abuse of discretion. Regardless of whether an affidavit was required, Trimble did not submit clear or convincing proof of being unavoidably prevented from discovering evidence, but merely of the existence of unauthenticated hearsay. Having failed to meet his burden, the denial of Trimble's motion for leave should be affirmed.

{¶35} I respectfully dissent.