[Cite as *State v. Beavers*, 2009-Ohio-5604.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22588
v.	:	T.C. NO. 94 CR 3052
REUBEN J. BEAVERS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 23rd day of October, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Rueben J. Beavers appeals from an order overruling his motion for a new trial. He contends that the trial court erred in overruling his motion upon the ground that his proffered, newly discovered evidence in the form of testimony of an eyewitness to the shooting was merely cumulative with the trial testimony of another eyewitness, and did not have a strong probability of changing the outcome of the trial. We conclude that newly

discovered evidence was not merely cumulative, but was reasonably likely to change the outcome of the trial. Accordingly, the order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 2} We set forth the history of the case in *State v. Beavers*, 166 Ohio App.3d 605, 2006-Ohio-1128 (hereinafter "*Beavers III*"), and repeat it herein in pertinent part:

{¶ 3} "[Beavers] was convicted following a jury trial of felonious assault and discharging a firearm at or into a habitation, and was sentenced to eighteen to twenty-eight years in prison. These convictions arose out of an incident in which [Beavers] was alleged to have shot into a house that was an illegal after hours drinking and gambling establishment, or 'boot joint.' One person inside that house was wounded. We affirmed [Beavers]'s conviction and sentence on direct appeal. *State v. Beavers* (January 28, 2000), Montgomery App. No. 15265.

{¶ 4} "[Beavers] filed a petition for post conviction relief alleging ineffective assistance of counsel based upon counsel's failure to call certain witnesses who could have exonerated Defendant. The trial court dismissed [Beavers]'s petition without a hearing. On appeal, we found that a genuine issue of material fact existed as to whether [Beavers]'s trial counsel was ineffective for having failed to call one particular witness, Raney Mease, whose alleged testimony might have exonerated [Beavers]. We reversed the dismissal and remanded the case to the trial court for an evidentiary hearing on [Beavers]'s petition.

{¶ 5} "On remand, the trial court held an evidentiary hearing on October 29, 1998. Raney Mease testified that he was at the boot joint at or before the shooting and witnessed the

shooting, and that another individual, not [Beavers], was the shooter. On August 19, 1999, the trial court overruled [Beavers]'s post conviction petition. The court found that at the time of his trial neither [Beavers] nor his counsel knew about Mease or how to contact him. Therefore, it would not have been reasonable to expect trial counsel to know of Mease's identity or the testimony he might offer at the time of trial from a description of 'a black man in a van.'

{¶ 6} "We affirmed the trial court's decision overruling [Beavers]'s petition for post conviction relief. *State v. Beavers* (April 21, 2000), Montgomery App. No. 17949. However, we also pointed out that because Mease's testimony constitutes strong exculpatory evidence which could not have with reasonable diligence have been discovered and produced at the trial, [Beavers] has an available remedy by way of a motion for a new trial filed pursuant to Crim.R. 33(A)(6). We stated that, on the evidence then before us that, and but for our lack of jurisdiction to grant that relief, we would be tempted ourselves to grant a motion by [Beavers] for a new trial. We further stated that because the testimony of the only known eyewitness to the incident would, if believed, completely exonerate [Beavers] , it is difficult to believe that Mease's testimony would not provide sufficient grounds for a different result at trial.

{¶ 7} "On July 13, 2000, [Beavers] filed a motion for a new trial as this court had suggested. [Beavers] agreed that no hearing on that motion was necessary because Defendant could rely on Mease's testimony and the other evidence presented at the October 29, 1998 hearing on [Beavers]'s petition for post-conviction relief.

{¶ 8} "[Beavers]'s motion for a new trial was not promptly reviewed by the trial court. While the motion was pending, the judge who had presided at [Beavers]'s trial and later heard the testimony of Raney Mease, Hon. David Sunderland, retired from the bench. His successor,

Hon. G. Jack Davis[1], eventually reviewed Defendant's motions.

{¶ 9} "On May 2, 2005, almost five years after it had been filed, the trial court overruled [Beavers]'s motion for a new trial without a hearing. The trial court concluded that [Beavers] failed to satisfy the requirements for obtaining a new trial based upon newly discovered evidence because (1) the testimony of a multiple-convicted felon such as Mease, which had been elicited in a prison setting, does not disclose a strong probability that it would change the result if a new trial is granted, and (2) the testimony offered by Mease would be cumulative and would only impeach or contradict the evidence presented at trial."

{¶ 10} In *Beavers III*, we reversed the order overruling Beavers's motion for a new trial. We held that given the lengthy pendency of the motion, as well as the transfer of the case to another judge, a new evidentiary hearing on Beavers's motion was warranted.

{¶ 11} On remand, the trial court conducted an evidentiary hearing over the course of three days: February 23, March 9, and March 16, 2007. Both Beavers and Mease testified during the course of the hearing. The trial court overruled Beavers's motion for a new trial. Specifically, the trial court held that Mease's testimony did not " 'disclose a strong probability that it will change the result if a new trial [were] granted.' " The trial court additionally held that Mease's testimony was cumulative with Braden Carlisle's trial testimony that he was an eyewitness to the shooting, and Beavers was not the shooter. Both Carlisle and Mease came forward with their potentially exculpatory testimony after meeting Beavers while incarcerated.

{¶ 12} Beavers appeals from the latest order overruling his motion for a new trial.

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[1]The Hon. G. Jack Davis passed away on March 4, 2007, and this case was transferred to the docket of Hon. Barbara P. Gorman.

II

{¶ 13} Beavers's assignments of error are as follows:

{¶ 14} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING MR. BEAVERS' MOTION FOR NEW TRIAL BECAUSE THE NEW EVIDENCE IN THE FORM OF MR. RANEY MEASE'S TESTIMONY DISCLOSES A STRONG POSSIBILITY THAT IT WILL CHANGE THE RESULT IF A NEW TRIAL IS GRANTED.

{¶ 15} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING MR. BEAVERS' MOTION FOR NEW TRIAL BECAUSE THE NEW EVIDENCE IN THE FORM OF MEASE'S TESTIMONY IS NOT MERELY CUMULATIVE TO FORMER EVIDENCE."

{¶ 16} Beavers contends that the trial court abused its discretion when it overruled his motion for a new trial because Mease's alleged eyewitness testimony was not merely cumulative, but would have created a strong probability that Beavers would have been acquitted after a second trial.

{¶ 17} In *State v. Petro* (1947), 148 Ohio St. 505, the Ohio Supreme Court stated:

{¶ 18} "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses 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." *Id.*, syllabus by the Court.

{¶ 19} "While [*State v. Petro*, supra] stands for the proposition that newly discovered

evidence that merely impeaches or contradicts other evidence is not enough for a new trial, we do not read *Petro* as establishing a per se rule excluding newly discovered evidence as a basis for a new trial simply because that evidence is in the nature of impeaching or contradicting evidence. The test is whether the newly discovered evidence would create a strong probability of a different result at trial, or whether it is merely impeaching or contradicting evidence that is insufficient to create a strong probability of a different result. See *State v. Kiraly*, supra, 56 Ohio App.2d at 54, * * * ; *State v. Barber*, supra, 3 Ohio App.3d at 448, * * * ; and *Toledo v. Easterling*, supra, 26 Ohio App.3d at 62 * * * .

{¶ 20} "In singling out impeaching or contradicting evidence, *Petro* recognized that the nature of such evidence requires that a trial court exercise circumspection in determining whether newly discovered evidence of that character would create a strong probability of a different result, because such evidence quite often will not be likely to change the outcome. In a case where the newly discovered evidence, though it is impeaching or contradicting in character, would be likely to change the outcome of the trial, we see no good reason not to grant a new trial. [Footnote omitted.]" *Dayton v. Martin* (1987), 43 Ohio App.3d 87, 90.

{¶ 21} Although *Dayton v. Martin*, supra, involved impeaching or contradicting evidence, we conclude that the same principle should apply to cumulative evidence, at least in the sense that the newly discovered evidence is similar to evidence that was admitted at trial. Consider a modification of the footnote omitted from the quotation above. At trial, a defendant in a case involving a shooting in Dayton offers alibi testimony from a friend he met in jail, awaiting trial. The friend testifies: "I can't be one hundred percent sure, but I think I saw the defendant, on the day of the shooting, being interrogated at a police station in Los Angeles as I

was passing by an interrogation room, and the door opened suddenly." After the trial, the defendant, who was using an alias while he was being interrogated in Los Angeles, discovers that there is a videotape of the interrogation. He moves for a new trial, based on the newly discovered videotape of himself being interrogated. The two-hour videotape features a full-face closeup of the interrogee, who is unquestionably the defendant. In the loosest sense, the videotape is merely cumulative with the alibi testimony at trial, since the point of both pieces of evidence is to show that the defendant was not at the scene of the crime at the time of the crime, but was on the other side of the country. But it makes no sense to say that because this evidence is "merely cumulative," the defendant cannot get a new trial. Surely there is a strong probability of a different result if this evidence is admitted.

{¶ 22} Because we construe the issue under *State v. Petro*, supra, to be whether the newly discovered evidence is: (1) merely cumulative with other evidence admitted at trial; or (2) evidence the admission of which would create a strong probability of a different result at trial, we consider Beavers's two assignments of error together.

{¶ 23} A motion for a new trial is addressed to the sound discretion of the trial court and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71. The term "abuse of discretion" "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Understandably, most instances in which abuses of discretion have been found have involved a determination that the trial court's decision is unreasonable, not that it is arbitrary or unconscionable. *AAAA Enterprises, Inc. v. Riverplace Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶ 24} Another way of considering judicial discretion is that when a determination has been confided to the discretion of a trial court, a reviewing court must give some deference to the trial court's determination. The extent of that deference is situationally dependent. A trial court's determination of how much of the jury voir dire will be conducted by the trial judge before turning the voir dire over to the attorneys, for example, is entitled to great deference. Other determinations – the determination whether a criminal defendant understands the rights he is waiving by pleading guilty, for example – are entitled to less deference. The extent of the deference to be accorded to a determination to be made by a trial court is also dependent upon the extent of guidance informing that determination imposed by higher authority, in the form of case law or statutory law. Where the external guidance informing a decision confided to the discretion of a trial court is extensive, the deference accorded to that decision will naturally be somewhat less.

{¶ 25} Here, the teachings of *State v. Petro*, supra, and cases following *Petro*, inform the trial court's decision whether to grant a motion for a new trial based upon newly discovered evidence, so that the trial court's decision is not being made in a jurisprudential vacuum.

{¶ 26} Where a case has been tried to a jury, a motion for new trial requires the court to determine whether it is likely that the jury would have reached a different verdict had it considered the newly discovered evidence. The task of the reviewing court is to then determine whether the trial court abused its discretion in making that determination. *Dayton v. Martin*, supra.

{¶ 27} Crim.R. 33(A)(6) applies to "new evidence material to the defense." That materiality standard does not specifically contemplate a credibility assessment of the evidence

offered. However, when the evidence is offered after the 120-day time limit has passed, the defendant must show: (1) that it is new evidence; (2) that he was unavoidably prevented from discovering within the time limit; (3) that it is based on fact; and (4) that the evidence is being proffered in good faith. 2 Baldwin's Ohio Practice, Section 79:9. The latter two considerations do contemplate some assessment of the credibility of any newly discovered testimony being offered. *State v. Martin*, Montgomery App. No. 20383, 2005-Ohio-209.

{¶ 28} After analyzing Mease's testimony from the evidentiary hearing in conjunction with his 1996 affidavit, the trial court identified several inconsistencies. Initially, the trial court noted that Mease was inconsistent regarding his exact location when the shooting began. In particular, Mease testified at the post-conviction relief hearing that the shooting did not start until he got back in his van and began driving away. At the hearing on his motion for new trial, Mease testified that the shooting began before he was able to get in his van. When questioned regarding the discrepancy in his testimony, Mease testified that he never stated that the shooting only began after he started driving, and that the court's stenographer may have incorrectly transcribed his testimony from the post-conviction relief hearing.

{¶ 29} The trial court also found that Mease's testimony was inconsistent with Beavers's testimony in regards to the number of people outside the "boot joint" when the shooting occurred. Mease testified that he only saw two people outside the "boot joint" when the shooting started, the black male shooter and a black female sitting in the shooter's vehicle parked just outside the after hours establishment. Mease testified that he never saw Beavers in or around the "boot"joint" at the time of the shooting.

{¶ 30} Beavers, on the other hand, testified that he had just walked off the porch, spoke

to the shooter whom he identified as "Mike D," and driven approximately 1.5 blocks away from the "boot joint" when the shooting started. Beavers testified that he never observed Mease exit his van, walk toward the "boot joint," and speak with "Mike D." Beavers also testified that there were other people outside the "boot joint" besides the shooter and the female in his car.

{¶ 31} The court pointed out that Mease's testimony regarding the time of day was inconsistent with testimony provided by other witnesses. Specifically, Mease testified that it was still dark outside when the shooting occurred, but that it was "dim" and "about to be daylight in a little while." Beavers testified that "[t]he robins were tweeting," and the sun was starting to come up. Dayton Police Officers, Krauskopf and Ross also testified that it was not dark, rather the sun was up when the shooting occurred.

{¶ 32} The trial court found that the numerous prior inconsistencies in his testimony, coupled with Mease's prior convictions, "several of which [were] for crimes involving dishonesty," would serve to undermine his credibility as a witness at trial. Questions of credibility are, of course, primarily for a jury to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 33} Because this case involved a shooting on the premises of, and involving patrons of, "an illegal after hours drinking and gambling establishment, or 'boot joint,' " it is not surprising that none of the witnesses who were present at the scene had the credibility of, say, the Archbishop of Canterbury. This includes the sole eyewitness who identified Beavers as the shooter, Arthur Farmer, the victim, who worked as a doorman for an illegal gambling operation for which he did not report his income, who had been using heroin the night before this incident, and who, like Mease, was a convicted felon. The State dismisses the problems with Farmer's

credibility with the observation that the jury nevertheless chose to believe him. This ignores the obvious advantage that Farmer had over Mease, in that the jury heard Farmer testify, but not Mease. We find it unlikely that a jury, hearing Mease testify, would find his testimony to be intrinsically much less worthy of belief than that of the other eyewitnesses.

{¶ 34} That leaves the crux of the issue – would Mease's testimony merely be cumulative with that of Carlisle, an eyewitness who did testify at the trial on Beavers's behalf? Carlisle testified, and Mease would testify, that he saw the shooter, and that it was not Beavers. But Carlisle was 100 to 150 feet from where the shots were fired, could not otherwise identify the shooter, and based his conclusion that Beavers was not the shooter upon the fact that the shooter appeared, at that distance, to be shorter than Beavers. Mease was closer to the perpetrator, less than twenty feet, "maybe a little bit shorter distance than between you [defense counsel at the new trial hearing] and the deputy here." Mease testified that "I got close enough to him to see he had a gun, see who he was or to look at him in the face." Like Carlisle, Mease could not identify the shooter, but unlike Carlisle, Mease had a chance to observe the perpetrator's face from within twenty feet – they exchanged words – and Mease got to know Beavers about two years after the shooting. He testified that the shooter was definitely not Beavers.

{¶ 35} Although we find the issue to be close, we conclude that Mease's testimony is not merely cumulative with the testimony of Carlisle at trial, because Mease was in a much better position to observe the perpetrator, which thereby provides a much stronger foundation for his conclusion that Beavers was not the shooter. As a result, the evidence represented by Mease's testimony is different, in kind and character, from the evidence represented by Carlisle's trial testimony.

{¶ 36} This was not an overwhelming evidence case. Both sides presented eyewitness testimony, and the eyewitness testimony presented by each side contained some inconsistencies. The State did present testimony from Agnes Maston, who testified that a person claiming to be "Warren Beavers," and later "Juan Beavers," but believed by her to have been Reuben Beavers, talked to her on the phone on three occasions and acknowledged having shot into the "boot joint." Beavers presented alibi testimony.

{¶ 37} As in every criminal case, a jury would not have to find that Beavers was not the shooter; it would merely have to find the existence of reasonable doubt that Beavers was the shooter. We conclude that Mease's testimony is not merely cumulative, and that if a jury were to hear Mease's testimony – subject, to be sure, to vigorous cross-examination – along with all the other evidence from both parties, there is a strong probability that the jury would have reasonable doubt, and acquit.

{¶ 38} Beavers's assignments of error are sustained.

IV

{¶ 39} Beavers's assignments of error having been sustained, the order of the trial court overruling Beavers's motion for a new trial is Reversed, and this cause is Remanded for further proceedings.

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DONOVAN, P.J. and GRADY, J., concur.

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