[Cite as *State v. Devaughns*, 2011-Ohio-125.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23720**
vs.	**:**	**T.C. CASE NO. 06CR843**
CHRISTOPHER A. DEVAUGHNS	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 14th day of January, 2011.

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GRADY, P.J.:

{¶ 1} Defendant, Christopher Devaughns, appeals from a judgment of the trial court that overruled his motion for a new trial based upon newly discovered evidence.

{¶ 2} The facts in this case were set forth in our previous decision in *State v. Devaughns*, Montgomery App. No. 21654, 2007-Ohio-3455, at ¶1-4, as follows:

{¶ 3} "The victim herein is Lynelle Moore, the mother of Devaughns' daughter, Crystal. Devaughns had custody of the child, and Lynelle would visit Devaughns' apartment about once a month. Lynelle is an admitted drug addict.

{¶ 4} "On February 26, 2006, Lynelle went to Good Samaritan Hospital for treatment for numerous injuries. Lynelle's injuries were life threatening and included two fractured ribs, a collapsed lung, blunt force trauma to the chest wall, burns on her arm, multiple bruises, and a fractured and dislocated finger. Lynelle told Dayton Police Officer David Blackburn, who responded to the hospital, that Devaughns beat her, causing her injuries two days earlier at his apartment in Dayton. Lynelle was hit, kicked, and beaten with an impact wrench and a table, and burned with hot water. After the assault, Lynelle testified that Devaughns told her to go upstairs to the bedroom and 'stay in there and heal up, heal up in a couple of weeks.' She stated that she lay on her daughter's bed and could not fall asleep because she was afraid she would not wake up. Lynelle stated that she 'used the bathroom in the bed' because Devaughns told her not to come out of the room.

{¶ 5} "Lynelle left the apartment once with Devaughns to visit

his brother, and she testified that she could not flee from Devaughns at that time because of her injuries. According to Lynelle, she was only able to get away from Devaughns when he took her daughter and left the apartment. She did not leave before then because she was afraid Devaughns would 'beat me up and kill me.' When Lynelle did leave, she did not immediately seek treatment for her injuries but instead went to a drug house where she spent the night with her sister, Katrina Moore. According to Katrina, she 'medicated' Lynelle with heroin there.

{¶ 6} "Four Dayton Police Officers responded to Devaughns' home in Dayton later in the day on February 26, 2006. Devaughns told the officers that his name was James Dozier, and he provided a social security number that matched the Dozier name per the computer in the officers' cruiser. When Devaughns was later being processed at the jail, however, a live scan of his fingerprint did not match the name he had given the officers. When confronted, Devaughns gave the officers his correct name, Christopher Devaughns, as well as the correct social security number and date of birth. James Dozier was actually Devaughns' brother who was killed in Viet Nam. According to Devaughns, he had been using the name Dozier since he was five years old."

{¶ 7} Defendant was indicted on one count of felonious assault, R.C. 2903.11(A)(1), and one count of Kidnapping, R.C.

2905.01(A)(3). Following a jury trial, Defendant was found guilty of both charges on May 4, 2006. The trial court sentenced Defendant to consecutive prison terms of eight years on the felonious assault and ten years on the kidnapping. On direct appeal we affirmed Defendant's convictions, but reversed and remanded for resentencing because the trial court failed to afford Defendant his right of allocution. *State v. Devaughns*, Montgomery App. No. 21654, 2007-Ohio-3455. On remand, the trial court imposed the same sentence as before. Defendant appealed and we affirmed the trial court's judgment. *State v. Devaughns*, Montgomery App. No. 22349, 2008-Ohio-4010.

{¶ 8} On August 20, 2009, Defendant filed a motion for a new trial based upon newly discovered evidence. Crim.R. 33(A)(6). The alleged new evidence consists of records from a daycare center which purport to show that Defendant picked up his daughter during the time when, according to the victim, Defendant remained with her and kept her confined in his apartment. Defendant claimed that he obtained this new evidence on February 18, 2009, from the Ohio Supreme Court's Office of Disciplinary Counsel as a result of a complaint he filed concerning his trial counsel. Defendant further claims that he was unavoidably prevented from discovering this new evidence within one hundred and twenty days after the guilty verdicts were rendered. Crim.R. 33(B). On October 6,

2009, the trial court summarily overruled Defendant's motion for a new trial, without a hearing. The court concluded that Defendant was not unavoidably prevented from discovering this new evidence and, in any event, there was no basis under Crim.R. 33 for granting a new trial.

{¶ 9} Defendant timely appealed to this court from the trial court's decision denying his motion for a new trial.

{¶ 10} Defendant's appellate counsel filed an *Anders* brief, *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. We notified Defendant of his appellate counsel's representations and afforded him sixty days to file his own pro se brief. Defendant has filed a pro se brief presenting six assignments of error for our review. This matter is now before us for a decision on the merits and our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

FIRST ASSIGNMENT OF ERROR

{¶ 11} "TRIAL COURT ABUSE OF DISCRETION IN ERROR DENYING, THE DEFENDANT'S MOTION FOR A NEW TRIAL, ON GROUNDS, OF (PERJURY O.R.C. 2921.11) CAN NEVER STAND AS GROUNDS FOR A CONVICTION WHEN IT INFRINGES UPON THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS CONSTITUTIONAL GUARANTEED BY THE OHIO CONSTITUTION ARTICLE 1,

SECTION 10, AND THE UNITED STATES CONSTITUTION. THE SENTENCE VIOLATES THE STANDARD SET FORTH UNDER THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSE UNDER THE U.S. CONSTITUTION."

SECOND ASSIGNMENT OF ERROR

{¶ 12} "TRIAL COURT ABUSED ITS DISCRETION, DENYING THE APPELLANT AN EVIDENTIARY HEARING, NEW EVIDENCE, PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO INFLUENCE/MISLEAD TRIAL JURY, NEW EVIDENCE SHOWS STRONG PROBABILITY OF DIFFERENT RESULT IF NEW TRIAL WERE GRANTED.

THIRD ASSIGNMENT OF ERROR

{¶ 13} "TRIAL COURT ABUSED ITS DISCRETION DENYING, APPELLANT'S MOTION FOR LEAVE FOR LATE MOTION FOR NEW TRIAL, WHEN MATERIAL APPENED (SIC), MADE A PRIMA FACIA CASE OF UNAVOIDABLY PREVENTED FROM DISCOVERY OF NEW EVIDENCE, NEW EVIDENCE SHOWS STRONG PROBABILITY OF DIFFERENT RESULT IF NEW TRIAL WERE GRANTED."

SIXTH ASSIGNMENT OF ERROR

{¶ 14} "TRIAL COURT ABUSED ITS DISCRETION, MAKING ERROR OF LAW, TRIAL COURT MAY NOT OVERRULED APPELLANT'S MOTION FOR NEW TRIAL, UNLESS THE TRIAL COURT MAKES FINDING OF UNAVOIDABLE DELAYED."

{¶ 15} In his first, second, third, and sixth assignments of error, Defendant argues that the trial court abused its discretion in denying his motion for a new trial based upon newly discovered

evidence. That is the same issue appellate counsel has identified as the only possible issue for appeal.

{¶ 16} The decision whether to grant a motion for a new trial lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71.

{¶ 17} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 18} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo,* would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 19} Pursuant to Crim.R. 33(A)(6), a new trial may be granted when new evidence material to the defense is discovered that the defendant could not with reasonable diligence have discovered and

produced at trial. To prevail on a motion for new trial based upon newly discovered evidence, Defendant must show that the new evidence: (1) discloses a strong probability that the result of the trial would be different if a new trial were granted; (2) has been discovered since the trial; (3) is such as could not have been discovered before the trial through the exercise of due diligence; (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. *State v. Petro* (1947), 148 Ohio St. 505.

{¶ 20} Motions for a new trial based upon newly discovered evidence must be filed within one hundred twenty days after the verdict was rendered unless it appears by clear and convincing proof that Defendant was unavoidably prevented from discovering the new evidence, in which case the motion for new trial must be filed within seven days from the order of the court finding that Defendant was unavoidably prevented from discovering the new evidence within the one hundred twenty day period. Crim.R. 33(B).

{¶ 21} Defendant's motion for a new trial based upon newly discovered evidence was filed over three years after the guilty verdicts were rendered, and is obviously untimely. Accordingly, Defendant was required to demonstrate by clear and convincing proof that he was unavoidably prevented from discovering the new evidence

within the one hundred and twenty day period after the verdicts were rendered. This Defendant has failed to do.

{¶ 22} The new evidence on which Defendant relies consists of a letter written by Mary Ann Powell, an employee of A&D Childcare, and that facility's daily attendance sheets. The letter states that on February 24, 2006, Defendant picked up his daughter, Crystal, from A&D Childcare, and that at 5:40 p.m. he signed her out, using the name James Dozier. The attendance sheets show the same thing. Defendant claims that this new evidence gives him an alibi because it shows that he was signing his daughter out of daycare at the time he was allegedly restraining the victim.

{¶ 23} A review of this record clearly reveals that this evidence was not new in relation to the issues of fact that were tried. The substance of Powell's letter was admitted into evidence at Defendant's trial as a stipulation. That stipulation was that "on Friday, February 24, 2006, Defendant picked daughter Crystal up from A&D Childcare and signed her out under the name James Dozier at 5:40 p.m." Trial transcript at 146-147. In order to be new evidence for purposes of Crim.R. 33(A), evidence must constitute proof of a relevant fact or matter that was not the subject of proof offered at trial. Evidence that would be offered to prove a fact or matter concerning which evidence was offered

at trial is not "new evidence" merely because it is proof different in form from that which was offered at trial.

{¶ 24} Defendant additionally complains that the State used perjured testimony to obtain his convictions. However, far from demonstrating that the victim committed perjury or that the State suborned perjury, Defendant merely claims that if his newly discovered evidence is believed, then the victim's trial testimony was untruthful.

{¶ 25} By its guilty verdicts the trier of facts, the jury, obviously chose to believe the victim rather than Defendant's alibi evidence, which it had a right to do. *State v. DeHass* (1967), 10 Ohio St.2d 230. Furthermore, the mere fact that at some point during Lynelle Moore's confinement Defendant briefly left his apartment to pickup his daughter does not exonerate Defendant and demonstrate that Defendant did not restrain Moore's liberty at other times during this period. Nor does the fact that Defendant briefly left the apartment necessarily establish that Moore had opportunities to escape confinement, given the physical injuries Defendant inflicted on her and his threat to kill her if she tried to escape.

{¶ 26} Defendant's first, second, third and sixth assignments of error are overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 27} "TRIAL TRANSCRIPT OF THE TRIAL 06CR843, SHOWS EVIDENCE OF TAMPERING NEGATIVELY AFFECTING THE APPEAL 09CA23720."

{¶ 28} Defendant argues that the trial transcript shows signs that it has been tampered with because testimony that never occurred, the direct examination of Defendant by his trial counsel, has been added to the transcript. The trial transcript demonstrates that when Defendant took the witness stand his counsel conducted a direct examination of him, and the videotape of the trial shows the same thing. This record does not exemplify Defendant's claimed error or otherwise demonstrate that the record does not accurately reflect the trial proceedings.

{¶ 29} Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 30} "APPOINTED APPELLATE ATTORNEY HAS ABANDONED THE APPELLANT: APPELLANT ATTORNEY HAS FILED AN *ANDERS* BRIEF."

{¶ 31} Defendant argues that his appellate counsel abandoned him by filing an *Anders* brief.

{¶ 32} Appellant counsel has represented to this court that he conducted a careful review of the trial record and was unable to locate any meritorious issues for appellate review. Counsel identified one possible issue that might arguably support an appeal, the trial court's overruling of Defendant's motion for a new trial based upon newly discovered evidence, but concluded

after analyzing the applicable law and the facts that this issue does not have any merit. Appellate counsel's conduct in this case satisfied his role and duties as an advocate in a case where counsel finds the appeal to be wholly frivolous. *Anders; Penson*.

{¶ 33} Defendant's fifth assignment of error is overruled.

{¶ 34} In addition to reviewing the possible issue for appeal identified by Defendant's appellate counsel and the issues presented by Defendant pro se, we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, this appeal is without merit and the judgment of the trial court will be affirmed.

DONOVAN, J., And FROELICH, J., concur.

Copies mailed to:

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