[Cite as *State v. Lenoir*, 2015-Ohio-1045.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26080
	:	
v.	:	T.C. NO. 05-CR-3027
	:	
LAMAR LENOIR	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 20th day of March, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Lamar Lenoir appeals the trial court's denial of his motion for leave to file a motion for new trial. The trial court's decision was issued on January 24, 2014. Lenoir filed a timely notice of appeal on February 10, 2014.

{¶ 2} Lenoir was convicted of the murder of Patricia Davis after a jury trial.

Thereafter, Lenoir filed a motion for new trial alleging prosecutorial misconduct and newly discovered evidence. The substance of the newly discovered evidence was a claim that Latonia Adkins, a witness who testified against Lenoir at trial, had recanted her testimony. In support of his motion, Lenoir submitted an audio recording of the alleged recantation. Adkins, however, testified at the hearing on the motion for a new trial that the individual speaking in the recording was not her. Adkins also testified that the woman speaking in the recording made statements that were factually inaccurate. The trial court overruled Lenoir's motion for a new trial and sentenced him to an aggregate prison term of eighteen years to life. Lenoir appealed, and we affirmed his conviction and sentence in an opinion issued on April 25, 2008. *State v. Lenoir*, 2d Dist. Montgomery No. 22239, 2008-Ohio-1984 (hereinafter "*Lenoir I*").

{¶ 3} Lenoir also filed a pro se petition for post-conviction relief which the trial court dismissed without a hearing in a decision issued on August 4, 2008. Lenoir appealed, and we affirmed the trial court's decision in an opinion issued on March 13, 2009. *State v. Lenoir*, 2d Dist. Montgomery No. 22893, 2009-Ohio-1275 (hereinafter "*Lenoir II*").

{¶ 4} In late 2011, Lenoir filed a petition for a writ of habeas corpus in the United States District Court, Southern District of Ohio. In his first ground for relief, Lenoir argued that the State utilized false testimony to obtain his conviction. Lenoir based his argument on witness statements to the police, physical evidence from the crime scene, and the testimony of certain witnesses at trial. The trial court denied his petition, finding that Lenoir failed to present any "new" evidence to establish his actual innocence because the evidence he submitted in support of his petition was available to him at the time of his trial. *Lenoir v. Warden*, *Southern Ohio Correctional Facility,* 886 F.Supp. 718,

729 (S.D.Ohio 2012).

{¶ 5} On May 25, 2012, Lenoir filed a motion for relief from judgment with the federal district court. In his motion, Lenoir argued that he possessed "newly discovered evidence" that one of the State's witnesses, Kirby Peterson, recanted his trial testimony identifying Lenoir as the individual who shot and killed Davis. The alleged "newly discovered evidence" consisted of an audio recording of a telephone conversation between Lenoir's sister, Jamisla Meaux, and Peterson. In a decision issued on July 2, 2012, the federal court denied his motion for relief from judgment, finding that Lenoir's claim was procedurally defaulted, and he had failed to excuse the default with a claim of actual innocence, as required. *Lenoir v. Warden*, *SOCF*, S.D.Ohio No. 3:09-cv-286, 2012 WL 2564824 (July 2, 2012). The federal court advised Lenoir that another potential avenue of relief was to file a petition for post-conviction relief with the state trial court and attach the audio recording as newly discovered evidence. *Id*.

{¶ 6} On May 2, 2013, Lenoir filed a pro se motion for leave to file a delayed motion for new trial. In support of his motion, Lenoir attached his and Meaux's affidavits. Lenoir also submitted the audio recording of the phone conversation between Peterson and Meaux. The transcript of the phone conversation established that Meaux suggested to Peterson that "the prosecutor told [him] what to say *** when he was up there on the witness stand." Peterson responded, "Oh yeah, they did." Peterson then stated that "they was [sic] like showing me old pictures of what happened."

{¶ 7} The State filed a memorandum in opposition to Lenoir's motion on July 12, 2013. The State attached affidavits from Peterson, the case detective, and the assistant prosecutors who originally tried the case in 2007. In his affidavit, Peterson directly

refuted the claims made by Lenoir in his motion for leave to file a motion for new trial. Specifically, Peterson stated that "at no time prior or during the trial did [the case detective or the assistant prosecutors], or anyone else tell [Peterson] what to say, other than to tell the truth." Peterson Affidavit, July 11, 2013. Peterson further stated that "his testimony at [Lenoir's] trial was truthful and accurate." *Id*. While Peterson acknowledged the statements he made to Meaux during the recorded phone conversation, he offered by way of explanation that "[i]t was awkward being [Lenoir]'s friend and having testified against him at trial. When [Meaux] offered that [Lenoir] thought the prosecutors told me what to say when I was on the witness stand, *I agreed so I would not look so bad in* [Lenoir's] *and his sister's eyes and 'Save face.'* " *Id*. Peterson stated that if he was called to testify again, he would still identify Lenoir as the individual that shot and killed Davis.

{¶ 8} On January 24, 2014, the trial court issued a decision and entry overruling Lenoir's motion for leave to file a motion for new trial without an evidentiary hearing.

{¶ 9} It is from this judgment that Lenoir now appeals.

{¶ 10} Lenoir's sole assignment of error is as follows:

{¶ 11} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL WITHOUT GRANTING A HEARING."

{¶ 12} In his sole assignment, Lenoir contends that the trial court erred when it overruled his motion for leave to file a delayed motion for new trial without first holding an evidentiary hearing. Specifically, Lenoir challenges the trial court's finding that he failed to establish by clear and convincing evidence that he was unavoidably prevented from discovering evidence of the phone conversation between Peterson and Meaux.

{¶ 13} Crim.R. 33 provides in relevant part as follows:

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.

* * *

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.

{¶ 14} As this Court has previously noted:

> * * * To seek a new trial based on new evidence more than 120 days after the verdict, a petitioner "must first file a motion for leave, showing by 'clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.' " [*State v. Parker*, 178 Ohio App.3d 574, 577, 2008-Ohio-5178], 899 N.E.2d 183 [(2d Dist.)], quoting *State v. Morgan*, Shelby App. No. 17-05-26, 2006-Ohio-145. " '[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.' " *Id*., quoting *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859.

State v. Wilson, 2d Dist. Montgomery No. 23247, 2009-Ohio-7035, ¶ 8.

{¶ 15} As this Court has further noted regarding a hearing on a motion for leave to file a motion for a new trial:

> * * * We have held that a defendant is entitled to such a hearing if he submits "documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence" at issue. *State v. York* (Feb. 18, 2000), Greene App. No. 99–CA–54, [2000 WL 192433], citing *State v. Wright* (1990), 67 Ohio App.3d 827, 828; see, also, *State v. Mitchell*, Montgomery App. No. 19816, 2004-Ohio-459, ¶ 7–10 (finding affidavits sufficient to warrant a hearing on whether the defendant was

> unavoidably prevented from discovering the facts upon which his request for a new trial relied). Notably, the documents at issue in *York* and *Wright* were affidavits from prosecution witnesses recanting their trial testimony against the defendant.

State v. McConnell, 170 Ohio App. 3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶ 19 (2d Dist.).

{¶ 16} "We review a trial court's ruling on a Crim.R. 33 motion for an abuse of discretion. *State v. McCoy*, 2d Dist. Montgomery No. 21032, 2006–Ohio–1137, ¶ 8." *State v. Thompson*, 2d Dist. Montgomery No. 25016, 2012-Ohio-4862, ¶ 7. This Court recently noted as follows:

> "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc*., 19 Ohio St.3d 83, 87, 482 N.E.2d 1248, 1252 (1985). 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.
>
> 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 Urban Redevelopment Corp*., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

State v. Mitchell, 2d Dist. Montgomery No. 25976, 2014-Ohio-5070, ¶ 13-14.

{¶ 17} Lenoir was convicted in March of 2007. Lenoir did not file his motion for leave to file a delayed motion for new trial until May 2, 2013, which is clearly outside the 120-day limit set forth in Crim.R. 33(A)(6). Thus, Lenoir was required to establish by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence upon which he relies. *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 17 (2d Dist.). Lenoir asserts that he could not have discovered the information discussed in the telephone conversation between Peterson and Meaux before the expiration of the 120-day deadline simply because the conversation did not take place until April 11, 2012.

{¶ 18} In finding that Lenoir was not entitled to leave to file a motion for a new trial, the trial court stated the following:

> Defendant has made nothing more than a mere allegation that he was unavoidably prevented from discovering the evidence he seeks to introduce in support of his motion for new trial. Defendant and Kirby Peterson were friends for many years. Lenoir was not prevented from investigating the case prior to trial; his counsel also cross-examined Peterson at trial. Furthermore, contrary to the assertions of Defendant, the telephone conversation, as transcribed, between Jamisla Meaux and Kirby Peterson does not represent a recantation of his testimony. Instead, Peterson clearly states that he is sorry for the part he played in Defendant's conviction, but he does not in any manner suggest that he was not truthful during his testimony. At best, Meaux suggested to Peterson that the

> prosecutor told him what to say and Peterson responded "they did that." He continued by saying, "I mean, like they was like showing me old pictures of what happened." Lenoir argues that Peterson could not possibly have witnessed the murder, nor seen who shot the victim because of the configuration of the restaurant and where Peterson was allegedly sitting. However, all of that evidence could have been discovered by Lenoir prior to trial. Additionally, most of the arguments made by Lenoir are simply reargu[sic]ments of points made at trial and the evidence at trial, none of which amounts to newly discovered evidence, nor an explanation of why Lenoir claims he was unavoidably prevented from obtaining the evidence. Defendant's trial counsel suggested in her closing argument that Peterson could not have seen what he claimed [i.e. that Lenoir shot Davis]. *** Perhaps more importantly, nothing in the affidavit of [Lenoir] or [Meaux] provides any evidence or explanation as to why he claims to have been unavoidably prevented from obtaining the evidence upon which he relies.

{¶ 19} On appeal, Lenoir asserts that he was entitled to a hearing on his motion for leave to file a motion for new trial because he could not have discovered evidence of the phone conversation between Peterson and Meaux before the 120-day time limit since it did not take place until April 11, 2012. Simply put, Lenoir argues that the date of the telephone conversation is prima facie evidence of unavoidable delay. Upon review, however, nothing in either Lenoir's or Meaux's affidavit supports his claim that he was unavoidably prevented from discovering the statements obtained from Peterson during the conversation with his sister. The siblings' affidavits merely state that the

conversation took place on April 12, 2012. Viewed in a light most favorable to Lenoir, the date of the conversation only indicates that he did not become aware of the information until April 12, 2012. We agree with the trial court that the affidavits do not satisfy the second prong of the test for newly discovered evidence, namely that which requires the petitioner to establish that he could not have learned of the information in the exercise of reasonable diligence.

{¶ 20} In support of his argument that he was entitled to a hearing, Lenoir cites *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77 (2d Dist.). In *McConnell*, the defendant was convicted of raping his minor daughter. Shortly thereafter, the victim recanted her testimony, stating that "nothing had happened between her and her father" and that "she may have dreamed" that she had been raped. In finding the evidence could not have been discovered with reasonable diligence, we relied on factors not present in the instant case. The recantation was reported by the victim's mother who "had no actual knowledge as to whether the child's sexual abuse allegations were true." *Id.* at ¶ 15. We further found that the defendant and his wife "had no reason to suspect that [their daughter] would recant her testimony prior to January 2006, when the child allegedly spoke about the issue with her mother." *Id*. Any recantation obtained at the urging of the defendant, his wife, or his attorney would have lacked credibility. *Id.* Specifically, in *McConnell*, we found that we were hesitant "to embrace a rule that would require a father convicted of raping his eight-year old child to pursue the victim to obtain a recantation of her trial testimony." *Id*.

{¶ 21} Unlike *McConnell*, the instant case does not involve a minor victim's spontaneous, volunteered recantation. Rather, Meaux initiated the call to Peterson,

wherein he allegedly recanted his testimony identifying Lenoir as the murderer. Moreover, the transcript of the conversation establishes that Meaux suggested to Peterson that the prosecutor told him what to say and Peterson responded "they did that." He continued by saying, "I mean, like they was like showing me old pictures of what happened." In our view, Peterson's statements to Meaux do not constitute even a partial recantation of his trial testimony. Peterson later stated in his affidavit attached to the State memorandum in opposition that he only agreed with Meaux's suggestion that the prosecutors told him what to say because he felt awkward about having testified against Lenoir, and he did not want to look bad in the eyes of either sibling. Additionally, Peterson stated that his "testimony at trial was truthful and accurate" and "at no time prior or during the trial did [the case detective or the assistant prosecutors], or anyone else tell [him] what to say, other than to tell the truth." Peterson Aff., ¶ 6, 7. Peterson further averred that if he was called to testify, he "would once again identify Lamar Lenoir as being the shooter and give the same testimony" that he provided at the trial in 2007. *Id*. at ¶ 8.

{¶ 22} We also note that the record establishes that Lenoir and Peterson were close friends for many years who spent time together every day. If Lenoir believed that Peterson had given false testimony, he could have promptly contacted Peterson and made the appropriate inquiries at any time after his trial. Significantly, the record establishes that Lenoir's trial counsel vigorously cross-examined Peterson regarding his location when the shooting occurred and whether he was in a position to observe who actually shot Davis. Although, Lenoir is incarcerated, he has not been prevented from contacting the witnesses who testified against him, especially if he believed they had

testified falsely. Accordingly, we find that Lenoir has failed to establish by clear and convincing evidence that he was unavoidably prevented from the discovery of the telephone conversation between Peterson and Meaux.

{¶ 23} Lastly, in *State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001 WL 332019 (Apr. 6, 2001), we found that a trial court may require a defendant to file his motion for leave to file a motion for new trial *within a reasonable time* after he discovers the new evidence. In *York*, the defendant waited over one and a half years after discovering the new evidence before he filed his motion for leave to file a motion for new trial. *Id*. We subsequently concluded that the defendant did not file his motion for leave within a reasonable time after he discovered the new evidence and affirmed the trial court's decision overruling his motion for leave to file a motion for new trial. *Id*.

{¶ 24} In the instant case, Lenoir asserts that he became aware of the telephone conversation between his sister and Peterson on April 12, 2012. Lenoir, however, did not file his motion for leave to file a motion for new trial until over a year later on May 2, 2013. We note that in May of 2012, Lenoir was focused on pursuing a writ of habeas corpus from the federal court based on the recording of the telephone conversation. However, we cannot excuse the lengthy delay in filing the motion for leave with the trial court wherein he utilized the same "newly discovered evidence." Lenoir did not need permission from the federal court to file his motion for leave in the trial court. Moreover, the record clearly indicates that Lenoir was aware that he could simultaneously file motions in both federal and state court. "Allowing the defendant to file a motion [for] leave [to file] a motion for new trial at any time would frustrate 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." *York*, citing *State v. Barnes*, 12th Dist. Clermont No. CA99-06-057, 1999 WL 1271665 (Dec. 30, 1999).

{¶ 25} Assuming arguendo that the trial court erred in determining that Lenoir was not unavoidably prevented from discovering the evidence upon which he relies, we would nevertheless affirm the trial court's ruling because Lenoir did not file his motion for leave to file a motion for new trial within a reasonable time after he discovered the new evidence.

{¶ 26} Lenoir's sole assignment of error is overruled.

{¶ 27} Lenoir's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

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