

[Cite as *State v. Reed*, 2015-Ohio-3051.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26526
	:	
v.	:	T.C. NO. 01CR4126
	:	
RASHAAN O. REED	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

.....
OPINION

Rendered on the 31st day of July, 2015.

.....
ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ANTHONY R. CICERO, Atty. Reg. No. 0065408, 500 E. Fifth Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

RASHAAN O. REED, #A415-481, Allen Correctional Institution, 2338 N. West St. 45801-2051, P. O. Box 4501, Lima, Ohio 45802
Defendant-Appellant

.....
FROELICH, P.J.

{¶ 1} Rashaan Reed appeals from the trial court’s denial of his motion for leave to

file a motion for a new trial.¹ For the following reasons, the trial court's judgment will be affirmed.

{¶ 2} In 2002, Reed was found guilty by a jury in the Montgomery County Court of Common Pleas of murder, with a firearm specification, and of tampering with evidence in connection with the death of Joseph Smith. He received sentences of 15 years to life for the murder and two years in prison for tampering with evidence, to be served consecutively to each other and to another sentence issued in a Miami County case (Miami C.P.No. 2000-CR-440). In addition, the trial court sentenced Reed to three years of incarceration for the firearm specification, to be served consecutively to and prior to the definite sentence. Reed's aggregate sentence in the Montgomery County case was 20 years to life in prison.

{¶ 3} Reed appealed from his conviction, raising three assignments of error. His first assignment of error claimed that the trial court committed prejudicial error by (1) precluding him from offering testimony that he was not present when or where the victim was killed (alibi testimony), (2) sustaining objections to questions offered to attack and to impeach the credibility of the State's witnesses, and (3) denying him the opportunity to impeach the testimony of Stacy Young, a State's witness, with prior inconsistent statements. His second and third assignments of error claimed that his conviction was against the manifest weight of the evidence and that the trial court improperly denied his Crim.R. 29 motion. We rejected each of Reed's arguments and affirmed his conviction. *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, 801 N.E.2d 862 (2d Dist.).

¹ Reed filed the notice of appeal and an appellate brief pro se. After the State filed its appellate brief, an attorney entered an appearance as counsel for Reed, and counsel filed a reply brief on Reed's behalf.

{¶ 4} In August 2008, Reed filed a pro se motion to vacate his conviction. The basis for his motion was that the indictment failed to include the mens rea for his offenses. The trial court denied the motion. Reed appealed, but the appeal was later dismissed due to his failure to timely file a brief. *State v. Reed*, 2d Dist. Montgomery No. 23802 (Sept. 8, 2010).

{¶ 5} In September 2010, Reed, pro se, moved for leave to file a motion for a new trial and filed a motion for a new trial, claiming that his sentence was void under *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958 (2009). The trial court denied his motions, but resentenced Reed to correct the imposition of post-release control and an error in the judgment entry.

{¶ 6} In May 2014, Reed, pro se, filed a motion for leave to file a delayed motion for a new trial, claiming that another individual, Patron Steele, committed the murder and that several State's witnesses lied when they testified that they did not receive any consideration or leniency from the State in exchange for their testimony. Reed withdrew the motion, with the court's consent, in July 2014.

{¶ 7} On October 7, 2014, Reed filed a pro se motion for leave to file a motion for a new trial, alleging misconduct by the prosecutor and two of the State's witnesses, Michael Shoemaker and Peter Holloway. Reed argued that Shoemaker and Holloway received leniency and the dismissal of charges in exchange for their testimony at Reed's trial, but that both witnesses testified – and the prosecutor argued to the trial court – that neither man received any promises from the State. Reed asserted that he was prejudiced by Shoemaker and Holloway's "false and perjured" testimony, which the prosecutor failed to correct. Reed further claimed that he was unavoidably prevented

from filing a timely motion due to ineffective assistance of trial counsel and the prohibition on hybrid representation.

{¶ 8} On November 24, 2014, the trial court overruled the motion for leave to file a motion for new trial on several grounds. The trial court rejected Reed's contention that he was unavoidably prevented from filing a timely Crim.R. 33 motion, and it concluded that trial counsel did not file a motion for a new trial because there was "no good ground for it." The court stated, "The evidence did not establish that Shoemaker and Holloway had lied when they testified they received no consideration for their testimony in this Reed Montgomery County case. The evidence indicated that Holloway and Shoemaker may have received consideration for their testimony in the Miami County case, but they did not receive any for the Montgomery County case." The trial court concluded that Reed provided no evidence that Holloway and Shoemaker gave false testimony.

{¶ 9} The trial court further denied Reed's motion on res judicata grounds. The trial court reasoned that Reed could have raised on direct appeal or in a petition for post-conviction relief any issue he had related to the trial court's ruling at trial with respect to the prosecutor agreements with Holloway and Shoemaker. And the trial court held that, as a successive motion, res judicata barred Reed's motion for a new trial.

{¶ 10} Finally, the trial court rejected Reed's argument that his trial counsel rendered ineffective assistance by failing to file a timely motion for a new trial. The court found no evidence that Reed's trial counsel had acted deficiently, and held that there was no indication that a new trial would have been granted had counsel filed such a motion.

{¶ 11} Reed appeals from the denial of his motion for leave to file a motion for new trial. His assignment of error states:

MR. REED WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE PROSECUTOR'S WITNESSES KNOWINGLY MADE FALSE STATEMENTS AND THE PROSECUTOR FAILED TO CORRECT THE FALSE TESTIMONY OF [ITS] WITNESSES AND PERMITTED [ITS] WITNESSES TO LIE TO THE JURY, AND THE TRIAL COURT ABUSED [ITS] DISCRETION WHEN IT FAILED TO GRANT MR. REED'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL.

{¶ 12} Crim.R. 33(A)(2) permits a defendant to file a motion for a new trial based on misconduct of the jury, the prosecuting attorney, or witnesses for the state. A motion for new trial based on Crim.R. 33(A)(2) generally must be made within fourteen days after the verdict was rendered.

{¶ 13} A defendant who seeks a new trial after the fourteen-day time period must first obtain leave from the trial court, demonstrating "by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial." Crim.R. 33(B). "[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 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." *State v. Walden*, 19 Ohio App.3d 141, 146, 483 N.E.2d 859 (10th Dist.1984); *State v. Wilson*, 2d Dist. Montgomery No. 23247, 2009-Ohio-7035, ¶ 8.

{¶ 14} A defendant is entitled to a hearing on his motion for leave 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*, 2d Dist. Greene No. 99-CA-54, 2000 WL 192433 (Feb. 18, 2000); *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶ 19 (2d Dist.).

{¶ 15} Although a defendant may file his motion for a new trial along with his request for leave to file such motion, the 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; *York, supra*.

{¶ 16} We review the trial court’s denial of leave to file a motion for a new trial for an abuse of discretion. *State v. Devaughns*, 2d Dist. Montgomery No. 25826, 2015-Ohio-452, ¶ 15. An abuse of discretion occurs when the decision of a court is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} Reed was convicted in 2002, but did not file his motion for leave to file a motion for a new trial until October 2014, years beyond the fourteen-day limit in Crim.R. 33(B).

{¶ 18} Reed claims that he was unavoidably prevented from filing a timely motion for a new trial as a result of the prohibition against hybrid representation. He states that, since he was represented by counsel in the trial court, he could not file a pro se motion for a new trial. Reed further asserts that his trial counsel’s failure to file such a motion was ineffective assistance.

{¶ 19} Reed’s affidavit in support of his motion for leave to file a motion for new

trial addresses the untimeliness of his motion, stating:

6. Mr. Reed was unavoidably prevented from filing a Motion for New Trial based on ineffective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitutions. In addition, Mr. Reed was unavoidably prevented from filing a timely Motion for New Trial due to the prohibition of hybrid-representation and if such prohibition was not in place Mr. Reed would have filed a timely Motion for New Trial in compliance with Ohio Criminal Rule 33.

* * *

8. Furthermore, Mr. Reed respectfully move this Court to find that he was unavoidably prevented from filing a timely Motion for New Trial based on the prohibition against hybrid-representation and ineffective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitution.

{¶ 20} Hybrid representation is disfavored in Ohio. See *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227; *State v. Hazel*, 2d Dist. Clark No. 2011 CA 16, 2012-Ohio-835, ¶ 63 (refusing to consider arguments raised pro se when defendant was represented by counsel). The Supreme Court of Ohio has held that “a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously.” *Martin* at ¶ 32.

{¶ 21} Reed has not presented any evidence that he tried to file a timely motion for new trial, but was prevented from doing so on the ground that he was represented by

counsel.² In addition, Reed does not state in his affidavit that he asked his trial attorney to file a timely motion for new trial, but his counsel refused to do so. In short, Reed has not presented any evidence that the prohibition against hybrid representation precluded him from filing a timely motion for new trial.

{¶ 22} Reed also asserts that he should be allowed to file a delayed motion for new trial, because his counsel's failure to file a timely motion constituted ineffective assistance. To establish ineffective assistance of counsel, Reed must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, he would have been granted a new trial. See *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70 (1992); *State v. Rucker*, 2d Dist. Montgomery No. 24340, 2012-Ohio-4860, ¶ 58.

{¶ 23} Trial counsel was aware of the issue surrounding whether Holloway and Shoemaker had received any promises or benefits from the State in exchange for their testimony. During Shoemaker's testimony, defense counsel asked for a sidebar to

² In his appellate brief, Reed indicates that his trial counsel died within two weeks of his (Reed's) sentencing. Reed did not mention this in either his motion for leave to file a motion for new trial or his affidavit.

discuss a plea agreement between the State and Shoemaker, during which “certain things * * * were given or promised” to Shoemaker in exchange for his cooperation. Defense counsel informed the court that he intended to cross-examine Shoemaker about the plea agreement. The prosecutor responded that the plea agreement had “to do with his [Shoemaker’s] drug dealing in Miami County, with the task force. This has nothing to do with a homicide in Dayton, Ohio. Zero.” The court denied defense counsel’s request to use the plea agreement on cross-examination. Holloway was also asked by the prosecutor and cross-examined by the defense counsel about whether he had been promised any benefits for talking with the police. The matter was thus raised and addressed by the trial court at trial.

{¶ 24} Having made a record of the issue during trial, defense counsel reasonably could have determined that any issue surrounding Holloway’s and Shoemaker’s testimony was preserved for direct appeal. And, in the absence of additional evidence that these witnesses provided false testimony or that the prosecutor suborned perjury, defense counsel could have reasonably concluded that there was little likelihood of success if raised in a motion for new trial. Accordingly, we find no merit to Reed’s claim that he should be excused from filing a timely motion for a new trial due to ineffective assistance of counsel.

{¶ 25} Finally, we note that Reed’s motion for leave to file a motion for new trial was filed nearly twelve years after his conviction. Where a defendant has established that he was unavoidably prevented from filing a timely motion for new trial, the trial court must still determine if the motion was filed within a reasonable time, under the circumstances. See *State v. McConnell*, 2d Dist. Montgomery No. 24315,

2011-Ohio-5555, ¶ 15 (if defendant establishes that he was unavoidably prevented from filing a timely motion for new trial but there was undue delay, the trial court must determine “if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay.”). Reed has offered no explanation for his lengthy delay. And, he has filed several pro se motions during that period of time. Based on the record, the trial court did not abuse its discretion when it concluded that Reed failed to establish by clear and convincing evidence that he was unavoidably prevented from filing a timely motion for a new trial.

{¶ 26} In addition, we agree with the trial court that res judicata bars Reed’s motion. “Pursuant to the doctrine of res judicata, a valid final judgment on the merits bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *State v. Collins*, 2d Dist. Montgomery No. 25612, 2013-Ohio-3645, ¶ 9, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). Res judicata applies to any defense that was raised or could have been raised in a criminal defendant’s prior direct appeal from his conviction. *Id.*, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶ 27} As stated above, the issue of Holloway and Shoemaker’s plea agreements with the State was raised in the trial court, and the trial court’s decision limiting cross-examination on that issue could have been raised on direct appeal. On appeal, Reed raised several evidentiary matters, including that the trial court erred in excluding alibi evidence, sustaining objections to questions offered to impeach the credibility of certain State’s witnesses, and in denying Reed the opportunity to impeach the testimony of Stacy Young with prior inconsistent statements. Reed did not appeal the trial court’s

rulings regarding Holloway and Shoemaker.

{¶ 28} In addition, Reed previously filed a motion for a new trial, pursuant to Crim.R. 33. That motion was directed to the trial court’s imposition of post-release control and errors in the judgment entry. Reed did not raise the alleged false testimony of Holloway or Shoemaker at that time, either. He cannot seek to raise those issues now.

{¶ 29} A substantial portion of Reed’s appellate brief focuses on Shoemaker’s plea agreement with the State, the “consideration” Holloway received, and whether Reed’s right to due process was violated by their testimony that they received no benefits from the State for their testimony. Because Reed failed to establish that he was unavoidably prevented from filing a timely motion for new trial, and given that his claim is barred by res judicata, we need not address the merits of Reed’s due process claim, i.e., whether there was misconduct on the part of the prosecutor, Holloway, or Shoemaker.

{¶ 30} Reed’s assignment of error is overruled.

{¶ 31} The trial court’s judgment will be affirmed.

.....

DONOVAN, J. and WELBAUM, J., concur.

Copies mailed to:

Andrew T. French
Anthony R. Cicero
Rashaan O. Reed
Hon. Timothy N. O’Connell