[Cite as *State v. Bennett,* 2017-Ohio-574.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA3765
vs.	:	
ROBERT L. BENNETT,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Robert L. Bennett, Chillicothe, Ohio, pro se

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:2-6-17

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a motion by Robert L. Bennett, defendant below and appellant herein, for leave to file a new trial motion. Appellant raises the following assignment of error:

> "THE JUDGMENT OF ENTRY OF THE TRIAL COURT ENTERED ON THE DEFENDANT'S MOTION FOR LEAVE TO FILE A NEW TRIAL WAS AN ABUSE OF DISCRETION WHEN THE TRIAL COURTS [SIC] RULING UNDER CRIMINAL RULE 33 WAS AN OVERBOARD [SIC] INTERPRETATION OF THE RULE AND THE TRIAL COURT REFUSED TO HOLD AN EVIDENTIARY HEARING AS TO

> PRINCIPLE INVOLVED WITH WOULD [SIC] HAVE GIVEN THE APPELLATE COURT A CLEAR RECORD OF THE ISSUES DEFENDANT/APPELLANT RAISED FOR HIS REQUEST FOR A NEW TRIAL [SIC]."

{¶ 2} In 2005, a jury found appellant guilty of murder in violation of R.C. 2903.02(B).[1] Appellant appealed the trial court's judgment of conviction and sentence and we affirmed. *State v. Bennett*, 4th Dist. Scioto No. 05CA2997, 2006-Ohio-2757, 2006 WL 1495251.

{¶ 3} In 2015, appellant filed a "Motion for Re-sentencing Based on Void Judgment." In his motion, appellant alleged that his sentence was void because the trial court (1) imposed an incorrect term of postrelease control, (2) failed to provide proper postrelease control notification, and (3) failed to notify him that the court could impose community control if appellant failed to pay court costs. The trial court overruled appellant's motion. Appellant appealed the trial court's judgment, and we affirmed. *State v. Bennett*, 4th Dist. Scioto No. 15CA3682, 2015-Ohio-3832, 2015 WL 5522012.

{¶ 4} On May 16, 2016, appellant filed a motion that requested leave to file a new trial motion. Appellant asserted that he was unavoidably prevented from discovering new evidence so as to timely file a new trial motion. Specifically, appellant alleged that he was unavoidably prevented from discovering that George Bennett, his brother, recanted his testimony. Appellant argued that he did not have any "control over when [George] decided to recant his trial testimony, and thus could not have learned of that [evidence] within the prescribed time in the exercise of reasonable diligence." To support his motion, appellant attached George's handwritten, notarized letter. In the letter, George stated that he "was forced to appear in court

against [appellant] by [the investigating detective]." George claimed that the detective "threatened [him] with prison time if [he] didn't appear in court." George further alleged that the detective "just put words in my mouth in court" and that he "just want[ed] the court system to know the truth." Appellant requested the trial court to "hold a hearing to inquire into the circumstances of the recantation to determine if [appellant] was indeed unavoidably prevented from discovering the purported new evidence."

{¶ 5} On May 26, 2016, the state filed a memorandum in opposition to appellant's motion. The state asserted that appellant failed to present clear and convincing evidence that he was unavoidably prevented from discovering his brother's allegations so as to timely file a new trial motion. The state further argued that even if appellant established that he was unavoidably prevented from timely filing the motion, he did not support his motion with an affidavit, but instead, a handwritten letter. The state additionally contended that the brother's letter fails to show that the brother was unlawfully coerced into testifying or that the outcome of the trial would have been different if the jury had heard the statements contained in George's letter. The state alleged that appellant presented nothing more than "a self-serving statement by a family member in an attempt to manufacture a reason to gain a new trial."

{¶ 6} On August 2, 2016, the trial court denied appellant's motion. The court determined that appellant failed to show that he was unavoidably prevented from discovering his brother's statements within one hundred twenty days of the jury's verdict. The court noted that the brother's letter indicates that he and appellant spoke on the phone while appellant was in jail, and "[t]hus, communication was clearly possible." The court additionally stated that although

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[1] Our prior decisions recount the underlying facts. We do not repeat them here.

appellant "wants to make a case that his brother committed perjury under coercion from the State," the record reflects that the brother "was under subpoena" and "therefore was obligated to come to court and testify." Moreover, the court found that the brother's sworn letter does not state that the brother committed perjury. The court explained: "The brother never says my testimony was false. He says that [the detective] put[] words in my mouth, but he does not state that the testimony he gave was perjured. Furthermore, he gives no indication as to what he now claims his testimony would have been or that he would have changed the substance of his testimony in any meaningful way." The court thus concluded that it had "no basis to believe that the initial testimony was false" or that "but for the brother's testimony the outcome would have been any different. In fact, the evidence at trial was more than sufficient to convict beyond a reasonable doubt had the brother decided to defy the subpoena and refused to testify."

{¶ 7} The court thus concluded that appellant

> utterly failed to show why this newly discovered evidence was unavailable to him leading up to trial. He has also failed to show that he was unavoidably prevented from discovering it in the twelve years since his conviction. The sworn statement is so vague and so short on details that this court can not possibly find that on its face it supports a finding of unavailability [sic]. And no other evidence was proffered by the Defendant to show how he was prevented from discovering this evidence in a timely manner.

This appeal followed.

{¶ 8} In his sole assignment of error, appellant argues that the trial court abused its discretion by denying his motion for leave to file new trial motion without conducting an evidentiary hearing.

{¶ 9} Trial courts ordinarily possess broad discretion when ruling on a defendant's motion for leave to file a new trial motion. *State v. Waddy*, 10th Dist. Franklin No. 15AP-397,

2016-Ohio-4911, 2016 WL 3667794, ¶ 20; *State v. Hill*, 8th Dist. Cuyahoga No. 102083, 2015–Ohio–1652, ¶ 16, citing *State v. McConnell,* 170 Ohio App.3d 800, 2007–Ohio–1181, 869 N.E.2d 77, ¶ 19 (2d Dist.); *State v. Clumm*, 4th Dist. Athens No. 08CA32, 2010–Ohio–342, ¶ 14*; State v. Pinkerman,* 88 Ohio App.3d 158, 160, 623 N.E.2d 643 (4th Dist.1993). Trial courts likewise possess discretion when determining whether a motion for leave to file a new trial motion warrants an evidentiary hearing. *Waddy* at ¶ 20; *Hill* at ¶ 16. Consequently, reviewing courts will not reverse trial court decisions denying a defendant's motion for leave to file a new trial motion without holding an evidentiary hearing, unless the trial court abused its discretion. *E.g., Clumm* at ¶ 14*; Pinkerman*, 88 Ohio App.3d at 160. An "abuse of discretion" means that the court acted in an "'unreasonable, arbitrary, or unconscionable'" manner or employed "'a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶ 23. Moreover, a trial court generally abuses its discretion when it fails to engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34.

{¶ 10} Crim.R. 33(B) typically requires a defendant to file a new trial motion based upon newly discovered evidence "within one hundred twenty days after the day upon which the verdict was rendered." However, the rule allows a defendant to file a new trial motion based upon

newly discovered evidence beyond the one hundred twenty day time period if "clear and convincing proof" shows "that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely." "The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner." *Waddy* at ¶ 19, citing *State v. Rodriguez–Baron*, 7th Dist. Mahoning No. 12–MA–44, 2012-Ohio-5360, 2012 WL 5863613, ¶ 11. "Clear and convincing evidence is '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 ex rel. Cincinnati Enquirer v. Deters*, – Ohio St.3d –, 2016-Ohio-8195, – N.E.3d —, ¶ 19, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 11} If a defendant shows that he was unavoidably prevented from discovering the evidence, then the defendant must file a new trial motion "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." Crim.R. 33(B). The rule thus contemplates that a defendant seeking a new trial after the one hundred twenty day time period obtain permission from the trial court to file the motion. *State v. Lenoir*, 2d Dist. Montgomery No. 26846, 2016-Ohio-4981, ¶ 18; *State v. Grissom*, 2d Dist. Montgomery No. 26626, 2016–Ohio–961, 2016 WL 3860940, ¶ 17; *State v. Hatton*, 4th Dist. Pickaway No. 11CA23, 2013-Ohio-475, 2013 WL 544061, ¶ 9.

{¶ 12} A defendant ordinarily 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. *Grissom* at ¶ 18, quoting *State v. York,* 2d Dist. Greene No. 99–CA–54, 2000 WL 192433 (Feb. 18, 2000). "[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. "We note that '[t]here is a material difference between being unaware of certain information and being unavoidably prevented from discovering that information, even in the exercise of due diligence.'" *Lenoir* at ¶ 24, quoting *State v. Warwick,* 2d Dist. Champaign No. 01CA33, 2002–Ohio–3649. Accordingly, "a defendant fails to demonstrate that he or she was unavoidably prevented from discovering new evidence when he would have discovered that information earlier had he or she exercised due diligence and some effort." *Id.*, citing *State v. Metcalf,* 2d Dist. Montgomery No. 26101, 2015–Ohio–3507, ¶ 11.

{¶ 13} In *State v. Lenoir,* 2nd Dist. Montgomery No. 26080, 2015-Ohio-1045, 2015 WL 1278205, the court determined that the trial court did not abuse its discretion by denying the defendant's motion for leave to file a new trial motion when the defendant failed to show that he was unavoidably prevented from discovering evidence that the prosecutor purportedly coached a witness's testimony and that the witness allegedly recanted his testimony. The defendant asserted that an April 2012 telephone conversation between his sister and one of the defendant's close friends showed that the prosecutor coached the friend's testimony and that the friend had not testified truthfully at trial. During the conversation, the defendant's sister "suggested * * *

that 'the Prosecutor told [the friend] what to say * * * when he was up there on the witness stand.'" *Id.* at ¶ 26. The friend responded, "'Oh yeah, they did.'" *Id.*

{¶ 14} The court rejected the defendant's argument that the date of the phone call "is prima facie evidence of unavoidable delay." *Id.* at ¶ 19. The court noted that while the date of the phone call may be the date of which the defendant became aware of the statement, the defendant did not explain why he was unavoidably prevented from discovering the substance of the statements within the one-hundred twenty day time period. The court pointed out that if the defendant believed that his friend "had given false testimony, he could have promptly contacted [his friend] and made the appropriate inquiries at any time after his trial." *Id.* at 22. The court also observed that the defendant's "trial counsel vigorously cross-examined [the friend] regarding his location when the shooting occurred and whether he was in a position to observe who actually shot [the victim]." *Id.* at ¶ 27.

{¶ 15} In the case at bar, we do not believe that the trial court abused its discretion by denying appellant's motion for leave to file a new trial motion or by failing to hold an evidentiary hearing regarding the motion. While George may not have provided a sworn statement to indicate that he felt coerced into testifying against appellant until November 2015, appellant's motion does not show that he was unable to discover his brother's alleged "coerced" testimony within one hundred twenty days of the jury's verdict. The date upon which appellant became aware of George's statement is not prima facie evidence that appellant was unavoidably prevented from discovering George's statement during the one hundred twenty day time period. *See id.* at ¶ 19.

{¶ 16} Furthermore, had appellant believed that George proffered false testimony during the trial, appellant "could have promptly contacted" George to make appropriate inquiries. *Id.* at 22. Additionally, defense counsel thoroughly cross-examined George and could have questioned George whether he testified willingly or whether he had been coerced. Appellant's trial counsel was fully aware that George had been subpoenaed as a witness for the state, had "ample opportunity" to prepare for cross-examination, and should have discovered whether there was evidence that George had been "coerced" by the state prior to trial. *State v. Maag*, 3rd Dist. Hancock No. 5-03-32, 2005-Ohio-3761, 2005 WL 1712898, ¶ 96 (declining to find appellant unavoidably prevented when trial counsel knew witness had been subpoenaed, had opportunity to prepare for cross-examination, and should have discovered whether evidence existed that witness coerced).

{¶ 17} Furthermore, as demonstrated in the following colloquy from the 2005 trial, George made it clear that he testified only because he was served with the subpoena and that it was "very painful" for him to testify against appellant:

> Q. [By the prosecutor]: You didn't volunteer to come up here at all?
> A. No.
> Q. If you had not gotten a subpoena you wouldn't have showed up would you?
> A. Right.
> Q. It's very painful for you to say what you said?
> A. Yes.

Appellant does not explain why this colloquy did not prompt him to further explore George's reluctance to testify during the 2005 trial.

{¶ 18} Also, during defense counsel's cross-examination, George relayed his hesitancy to testify. George indicated that he "wasn't trying to be involved in nothing [sic]" and that he did

not "want to get dragged into this." Although George's trial testimony does not specifically state that he felt "coerced" into testifying or that he was threatened with jail if he did not testify, George's testimony does show his reluctance to testify against appellant.

{¶ 19} Consequently, we do not believe that the trial court abused its discretion by determining that appellant failed to present clear and convincing evidence to show that he was unavoidably prevented from discovering George's statements within one hundred twenty days of the jury's verdict. Therefore, the trial court did not abuse its discretion by overruling appellant's motion for leave to file a new trial motion without holding an evidentiary hearing.

{¶ 20} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.