[Cite as *State v. Roberts,* 2010-Ohio-2935.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 09 CA 11
	:	
	:	
CLARENCE D. (SKIP) ROBERTS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Guernsey County Court of Common Pleas Case No. 97-CR-63
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 18, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Clarence "Skip" Roberts, appeals a judgment of the Guernsey County Common Pleas Court overruling his motion for new trial. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On June 30, 1997, the Guernsey County Grand Jury indicted appellant on one count of aggravated robbery, in violation of R.C. 2911.01, and one count of aggravated murder, in violation of R.C. 2903.01, with a death penalty specification. The charges arose out of the robbery and stabbing death of Leo Sinnett on May 17, 1997. The matter proceeded to trial by jury on September 15, 1997.

{¶3} The following evidence was adduced at trial.

{¶4} On May 15, 1997, appellant, Albert "Chip" Andrews, John LaFollette, and Mia Willey traveled to Zanesville, Ohio, in appellant's white 1986 Oldsmobile Cutlas Cierra on a "drug buy." Appellant and Andrews purchased $100.00 worth of crack cocaine from "a black guy in Zanesville" with money borrowed from Willey. After smoking the crack, appellant and Andrews returned to the dealer's house in order to get their money back because they were not satisfied with the quality of the drugs. The dealer refused to offer a money back guarantee and the group's discussion focused on where to obtain money to buy more drugs. Andrews stated he knew somebody the group could rob. When Andrews mentioned Leo Sinnett's name, appellant suggested foregoing the robbing of Sinnett and proceeding to kill him. Andrew, LaFollette and Willey were named as co-defendants.

{¶5} On May 17, 1997, the group reconvened at Willey's house. Appellant and Andrews left to purchase beer and cigarettes. When they returned, appellant and Andrews asked LaFollette if he wanted to go for a drive. Andrews drove appellant's vehicle; appellant sat in the front passenger's seat; and LaFollette positioned himself in the back seat. Andrews drove to 12225 Lincoln Street, Buffalo, Ohio, Sinnett's residence. Appellant and LaFollette exited the car. Andrews remained in the vehicle. LaFollette walked to the front of the house to inspect some trees he had arranged to remove for Sinnett. As appellant exited the front door of Sinnett's residence, he told LaFollette, “There's no need in talking to him, he's dead.” The two returned to the vehicle and the trio left the scene.

{¶6} At 6:49 p.m. on the same evening, Sergeant Brian Vierstra of the Ohio State Highway Patrol observed a white Oldsmobile traveling westbound out of Buffalo on State Route 313, just past the I-77 bypass. As the vehicle approached, Sergeant Vierstra noticed the car did not have any visible front registration. When the vehicle traveled past, the officer did not observe any visible rear registration. Thereafter, Sergeant Vierstra activated his lights and pursued the vehicle, which continued westbound until the driver entered a private driveway. The driver and right front passenger exited the vehicle. The officer ordered the passenger back into the vehicle and instructed the driver to walk to the back of the car. Sergeant Vierstra observed a third male in the back seat of the vehicle.

{¶7} As the officer spoke with the driver, who was identified as Andrews, Sergeant Vierstra found him to be under the influence of alcohol. When Andrews

refused to submit to field sobriety tests, the officer placed him under arrest. Shortly thereafter, Trooper Stolarick arrived at the scene.

{¶8} The two officers spoke with appellant, who was covered in blood from his waist to his knees. Trooper Stolarick asked appellant about the blood. Appellant informed the officers he had just processed a road kill deer. When the officers advised appellant the vehicle would be impounded, appellant told them he had a knife on his person. Sergeant Vierstra described the weapon as a four inch, double-edged knife with a black handle contained in a leather sheath.

{¶9} As the officers spoke with appellant, LaFollette exited the vehicle and walked directly into a nearby residence. The officers did not observe any blood on his clothing or his person. Jim Tuttle, the owner of the house, appeared and offered to allow appellant and LaFollette to stay with him. Thereafter, Sergeant Vierstra transported Andrews to the station, while Trooper Stolarick waited for the tow truck to impound appellant's vehicle.

{¶10} After leaving the scene, Trooper Stolarick contacted Deputy Masters of the Cambridge Sheriff's Department to inform the deputy he (Trooper Stolarick) was assisting that evening in overseeing the Meadowbrook High School prom goers. During their conversation, Deputy Masters received a call from his dispatcher advising of the discovery of a body. Deputy Masters and Trooper Stolarick proceeded to the Sinnett residence. Upon their arrival, the officers learned of Sinnett's stabbing death. The Trooper recalled the traffic stop he and Sergeant Vierstra made earlier that evening. Deputy Masters, Trooper Stolarick and two other deputies did not locate anyone upon their return to the Tuttle residence.

{¶11} The following day, appellant was arrested. LaFollette fled to Pennsylvania where he was arrested approximately one month after the incident.

{¶12} Special Agent Mike Kopfer of the Bureau of Criminal Identification assisted in the investigation of Sinnett's homicide. During his investigation, Agent Kopfer found blood stains on the front passenger's seat of the white Oldsmobile. The agent did not observe any other blood stains in the vehicle. Margaret Saupe, a forensic scientist with the Bureau of Criminal Identification, also examined the Oldsmobile and observed blood stains on the front passenger's seat. A DNA analysis of the blood sample indicated the blood was that of the victim. Saupe's analysis of Andrews' personal belongings, which were recovered during the investigation, revealed no traces of blood.

{¶13} After LaFollette's arrest in Pennsylvania, he gave two taped statements to the Guernsey County Sheriff's Department. LaFollette's first statement was given to Detective Ron Pollock on June 18, 1997. The second was given to Detective Pollock and Detective John Davis on June 25, 1997.

{¶14} At trial, appellant called LaFollette as a witness. Due to LaFollette's alignment with the State, the trial court permitted both parties latitude in their examinations of LaFollette. Attorney Tingle, appellant's trial counsel, attempted to impeach LaFollette with his prior statements. However, the trial court found the statements were not inconsistent with the witness' trial testimony and would not allow Attorney Tingle to make further inquiry into the statements LaFollette made to police. The statements were proffered into evidence.

{¶15} After hearing all the evidence and deliberations, the jury found appellant guilty of aggravated robbery and aggravated murder. The jury did not recommend the

death sentence. Via Judgment of Conviction dated October 6, 1997, the trial court memorialized the jury's verdicts. Via Judgment Entry of Sentence dated November 4, 1997, the trial court sentenced appellant to life imprisonment without parole for the offense of aggravated murder and a term of ten years for the offense of aggravated robbery. The trial court ordered the sentences to run consecutively.

{¶16} Appellant filed a direct appeal to this Court. This Court affirmed the trial court. See *State v. Roberts* (Nov. 24, 1998), Guernsey App. No. 97 CA 29.

{¶17} After unsuccessfully appealing his case in the Ohio state courts, Roberts filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Ohio. The district court denied the writ. The Sixth Circuit Court of Appeals granted Roberts a certificate of appealability with respect to the following claims: (1) whether Roberts was deprived of a fair trial, a trial by jury, and due process when the trial court ordered that alternate jurors be present during deliberations; and (2) whether Roberts was deprived of the effective assistance of appellate counsel when his appellate counsel failed to raise as error the trial court's order that alternate jurors be present during deliberations. The court affirmed the district court's denial of Roberts' petition. *Roberts v. Carter* (6th Cir.2003), 337 F.3d 609. The United States Supreme Court denied appellant's writ of Certiorari. *Roberts v. Carter* (2004), 540 U.S. 1151, 124 S.Ct. 1150.

{¶18} On October 1, 2004, appellant filed an application for DNA testing. The Guernsey County Prosecuting Attorney filed a report regarding the existence of biological material available for DNA testing on December 5, 2004. On April 6, 2005, appellant was appointed counsel to pursue his application for DNA testing. The trial

court denied appellant's request on December 14, 2005, concluding that: 1). R.C. 2953.74(C)(1) had been satisfied in that biological material was collected from the crime scene or the victim of the offense and that the material is still in existence; 2). R.C. 2953.74(C)(2)(a) was not satisfied as the testimony at appellant's trial indicated that the sample of biological material does not contain sufficient material to be extracted for a test sample; and 3). Even if there were sufficient biological material to perform DNA testing the results would not be outcome determinative because no fingerprint or hair was attributed to appellant during his trial and the testimony of the witnesses was sufficient to convict appellant even if he were excluded as the source of the hair or fingerprint. This Court affirmed. *State v. Roberts*, Guernsey App. No. 2006-CA-02, 2006-Ohio-5018.

{¶19} On May 16, 2005, appellant filed a pro se Motion to Vacate and Reconstruct Sentence pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The trial court denied appellant's motion. In response to appellant's request for findings of fact and conclusions of law, the trial court issued those findings and conclusions on August 17, 2005. The trial court concluded that neither of Mr. Roberts' sentences exceeded the statutory maximum, and that *Blakely* "did not deal with the issue of consecutive sentences for multiple convictions." Judgment Entry filed August 17, 2005, at 2.

{¶20} Appellant filed his appeal from the denial of his Petition to Vacate or Reconstruct Sentence. This court affirmed the trial court's decision. See, *State v. Roberts,* 5th Dist. No.2005-CA-26, 2006-Ohio-782.

{¶21} On March 26, 2007, Roberts filed a Motion for Records, Documents, and Discovery Materials in the Guernsey County Common Pleas Court. On May 2, 2007, the Guernsey County Common Pleas Court granted in part and denied in part appellant's Motion with respect to the Guernsey County Prosecutor's Office. In that entry, the Court ordered the State of Ohio to disclose all relevant discovery that does not constitute attorney work product.

{¶22} On May 31, 2007, pursuant to the order of the Guernsey County Common Pleas Court, the Guernsey County Prosecutor's Office sent two hundred and four pages of discovery to the appellant. On June 4, 2007, appellant filed a Motion to Compel stating that the Prosecutor's Office did not comply with the Court Order of May 2, 2007. On June 19, 2007, appellant filed a "Motion to Supplement the Record," requesting the "Court to supplement the motions to compel now pending before [the trial court] and scheduled for a non-oral hearing on June 19, 2007." On June 19, 2007, the Guernsey County Common Pleas Court denied appellant's Motion to Compel with respect to the Guernsey County Prosecutor's Office stating that the discovery was provided. On July 13, 2007, the trial court found appellant's "motion to supplement the record" moot as the Court had previously denied appellant's motion to compel stating that the discovery was provided. This Court affirmed the trial court. *State v. Roberts*, Guernsey App. No. 2007-CA-33, 2008-Ohio-3115.

{¶23} On July 18, 2008, appellant filed a pro se motion for leave to file a new trial motion. The court granted leave to file a motion for new trial on October 27, 2008, and appointed counsel. The pro se motion was filed on October 28, 2008, and supplemented by counsel on February 23, 2009. The motion alleged that appellant's

counsel had a conflict of interest, as one attorney, Lewis Tingle, had previously represented the estate of Betty Sinnett, in which the executor was the victim in this case, Leo Sinnett, and had also represented Carol LaFollette, the mother of the co-defendant, in a civil proceeding in 1992. He also argued his second attorney, Kent Biegler, had a conflict of interest because he was representing the Guernsey County Children's Services Board at the time of trial, and, six months after the trial, went to work for the county prosecutor's office. The motion alleged that based on newly discovered evidence he should be granted a new trial. The newly discovered evidence attached to the motion is an affidavit of Dillon Sargent, an inmate at the Lebanon Correctional Institution. In this affidavit, Sargent avers that on July 9, 1999, he heard John LaFollette say to his co-defendant, a man Sargent knew as "Chip," that LaFollette killed and robbed a "Leo Sinpitt." The affidavit states Lafollette claimed that he took $9,000.00 or $10,000.00 from this man and spent it while he was on the run. Sargent avers that when Chip told LaFollette that appellant was going to get a new trial, LaFollette said it didn't matter because he (LaFollette) already "got his time" and the court could not try him again.

{¶24} The court overruled the motion for new trial on March 20, 2009, finding that there was not sufficient evidence that an actual conflict of interest existed on the part of Attorney Tingle, as his representations ended prior to the murder of Leo Sinnett. The court further found that Attorney Biegler did not represent the Children's Services Board at the time of trial, but did represent the Guernsey County Child Support Enforcement Agency on a contract basis in paternity matters. The court found no demonstration of a conflict of interest on the part of Biegler. The court found that the

affidavit of Sargent served merely to impeach or contradict prior evidence and thus was not sufficient grounds for a new trial.

{¶25} Appellant assigns two errors on appeal:

{¶26} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW, AND/OR ABUSED ITS DISCRETION, IN DENYING THE MOTION FOR NEW TRIAL IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW, CONFLICT FREE COUNSEL AND THE 5TH, 6TH, AND 14TH AMDNEMENTS (SIC) TO THE CONSTITUTION OF THE UNITED STATES.

{¶27} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING AN EVIDENTIARY HEARING ON THE NEW TRIAL MOTION IN VIOLATION OF ROBERTS' RIGHT TO DUE PROCESS AND THE 14TH AMENDMENT."

I

{¶28} In his first assignment of error, appellant argues that the court erred in overruling his motion for new trial on grounds of conflict of interest of counsel and the newly discovered evidence in the form of the affidavit of Dillon Sargent.

{¶29} Crim. R. 33 governs a motion for new trial:

{¶30} "**(A) Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶31} "(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

{¶32} "(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶33} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶34} "(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

{¶35} "(5) Error of law occurring at the trial;

{¶36} "(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.

{¶37} "**(B) Motion for new trial; form, time.** Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding

that the defendant was unavoidably prevented from filing such motion within the time provided herein.

{¶38} "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***"

{¶39} The decision whether to grant or deny a motion for a new trial is committed to the sound discretion of the trial court. See *State v. LaMar* (2002), 95 Ohio St.3d 181, 201, 767 N.E.2d 166; *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus; see, also, *State v. Matthews* (1998), 81 Ohio St.3d 375, 691 N.E.2d 1041; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus. Thus, we will not reverse a trial court's denial of a motion for a new trial absent an abuse of that discretion. *LaMar,* 95 Ohio St.3d at 201, 767 N.E.2d 166; *Schiebel,* 55 Ohio St.3d at 76, 564 N.E.2d 54. An abuse of discretion is more than an error in judgment. Instead, it implies that a court's ruling is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶40} If a defendant files a motion for a new trial after the time periods specified in Crim.R. 33(B) have expired, the defendant first must seek leave of court to file a delayed motion. *State v. Mathis* (1999), 134 Ohio App.3d 77, 79, 730 N.E.2d 410. To

obtain leave, the defendant must demonstrate by clear and convincing evidence that he was unavoidably prevented from timely filing the motion for a new trial or from discovering the new evidence. *Id.; State v. Roberts* (2001), 141 Ohio App.3d 578, 582, 752 N.E.2d 331. A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the evidence or grounds supporting the motion for a new trial and, in the exercise of reasonable diligence, could not have learned of the matters within the time provided by Crim.R. 33(B). *Mathis,* supra.

{¶41} In the instant case, appellant filed his motion for new trial nearly eleven years after his conviction.

{¶42} We first address appellant's arguments regarding the conflict of interest of his attorneys, Tingle and Biegler.

{¶43} Although the court granted appellant leave to file his motion for new trial, appellant failed to allege or demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the conflict of interest. See *State v. Stewart*, Washington App. No. 02CA29, 2003-Ohio-4850, ¶15, citing *State v. Valentine,* Portage App. No. 2002-P-0052, 2003-Ohio-2838. In his motion, appellant makes no attempt to demonstrate why he was unavoidably prevented from discovering the conflict of interest within the time constraints set forth in Crim.R. 33, and the supplement filed by counsel generally asserts that the conflict of interest recently came to appellant's attention. The trial court was under no obligation to consider the portion of the motion relating to the alleged conflict of interest because appellant failed to demonstrate grounds for the untimely filing of the motion. *Stewart*, supra, at ¶13.

{¶44} Appellant further has not demonstrated that the court abused its discretion in overruling this portion of the motion. While appellant now attempts to argue that the court abused its discretion by applying the wrong standard of review and should not have required him to demonstrate an actual conflict of interest, in his supplemental motion, counsel for appellant asserted that to establish a violation of the Sixth Amendment, he must demonstrate an actual conflict of interest which adversely affected his lawyer's performance, citing *State v. Hooks* (2001), 92 Ohio St.3d 83, 85. Appellant now argues that the test set forth in *Hooks* is incorrect, and he was required only to show that counsel's performance was ineffective under *Strickland v. Washington* (1984), 466 U.S. 668. Appellant makes this argument based on *Stewart v. Wolfenbarger* (6th Cir. 2006), 468 F.3d 338, 351, which provides in pertinent part:

{¶45} "This Court has consistently held that, for § 2254 cases, the *Sullivan* standard does not apply to claims of conflict of interest other than multiple concurrent representation; in such cases, including successive representation, the *Strickland* standard applies. *See Gillard v. Mitchell,* 445 F.3d 883, 891 (6th Cir.2006) (successive representation); *Whiting v. Burt,* 395 F.3d 602, 619-20 (6th Cir.2005) (same counsel for trial and direct appeal); *Lordi v. Ishee,* 384 F.3d 189, 193 (6th Cir.2005) (successive representation); *Smith v. Hofbauer,* 312 F.3d 809, 818 (6th Cir.2002) (counsel was charged with a crime in the same county as the petitioner)."

{¶46} Appellant's reliance on *Stewart* is misplaced. *Stewart* sets forth the standard of review for a conflict of interest claim in a federal habeas corpus proceeding filed under 28 U.S.C. 2254. The instant action is not a federal habeas proceeding, but a new trial motion filed under State law. Ohio courts have consistently held that when a

party does not raise the conflict of interest issue at trial, even if the party was not aware of the conflict, the party must demonstrate an actual conflict of interest which adversely affected defense counsel's performance. A potential conflict is insufficient. *Hooks*, supra, at 84. To demonstrate an actual conflict, the defendant must show that (1) a viable and plausible alternative defense strategy or tactic might have been pursued, and (2) the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. *State v. Gillard* (1997), 78 Ohio St. 3d 548, 553, 679 N.E.2d 276. The trial court has wide latitude in determining whether a conflict of interest existed. *State v. Pelphrey* (2002), 149 Ohio App.3d 578, 583, 778 N.E.2d 129, citing *State v. Keenan* (1998), 81 Ohio St.3d 133, 689 N.E.2d 929.

{¶47} Appellant argued that his attorneys' conflict of interest was demonstrated by counsels' failure to interview David Black, failure to interview Bob Stillions, failure to properly investigate and/or cross-examine Shirley Stillions, failure to have appellant's leather jacket examined, failure to cross-examine Agent Kopfor regarding the leather jacket, failure to investigate a thumb print or shoe print and failure to test blood evidence found in the victim's pocket. Appellant failed to demonstrate that any failure on the part of his attorneys to perform these tasks was caused by Tingle's prior representation of family members of the victim and co-defendant in completely unrelated civil matters, or by Biegler's contract work for the state handling paternity cases and his eventual employment by the prosecutor's office six months after trial. Appellant did not demonstrate to the trial court that his attorneys failed to undertake investigation in these areas because of other loyalties or interests, or that these tasks were inherently in conflict with counsel's other loyalties.

{¶48} We next address appellant's claim that the court should have granted his motion for new trial based on the affidavit of Dillon Sargent.

{¶49} In order to grant a Crim.R. 33 motion for a new trial on the ground of newly discovered evidence, it must be shown that the newly discovered evidence upon which the motion is based:

{¶50} "(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." *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

{¶51} Contrary to appellant's argument, LaFollette's statement in the prison as overheard by Sargent is not a confession to being the principal offender, nor does it exonerate appellant. LaFollette was simply heard to say that he killed and robbed Leo Sinnett, and that he didn't care if appellant got a new trial because he had already been convicted and sentenced. While LaFollette made conflicting statements during the course of the investigation and trial concerning the extent of his involvement in the crime, he entered guilty pleas to complicity to commit involuntary manslaughter and complicity to commit aggravated robbery. Therefore, his statements that he robbed and killed Leo Sinnett does nothing more than restate his guilt for the crimes to which he already pleaded guilty. Nothing in Sargent's statement indicates that LaFollette confessed to being the principal offender or said anything that would exonerate appellant from being the principal offender. Appellant failed to demonstrate that the

affidavit of Sargent discloses a strong probability that he would be acquitted if a new trial is granted.

{¶52} The first assignment of error is overruled.

II

{¶53} In his second assignment of error, appellant argues that the court erred in failing to grant him an evidentiary hearing on the issue of Sargent's affidavit.

{¶54} A trial court has broad discretion to determine whether a motion for new trial merits an evidentiary hearing. See, e.g., *State v. Tomlinson* (1997), 125 Ohio App.3d 13, 19, 707 N.E.2d 955. This Court has previously held that where the newly discovered evidence, if believed, would prove the defendant's innocence, a court abuses its discretion in not holding an evidentiary hearing. *State v. Monk*, Knox App. No. 02CA000026, 2002-Ohio-6602, ¶10.

{¶55} As we discussed in the first assignment of error, contrary to appellant's arguments, the affidavit of Sargent does not demonstrate that LaFollette confessed to being the principal offender in the murder and robbery of Leo Sinnett, nor does the statement exonerate appellant from culpability as the principal offender. The court therefore did not abuse its discretion in failing to grant an evidentiary hearing on the motion. The affidavit of Sargent, if believed, does not establish appellant's innocence.

{¶56} The second assignment of error is overruled.

{¶57} The judgment of the Guernsey County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/r0329

[Cite as *State v. Roberts,* 2010-Ohio-2935.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CLARENCE D. (SKIP) ROBERTS	:	
Defendant-Appellant	:	CASE NO. 09 CA 11

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Guernsey County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Sheila G. Farmer

JUDGES