[Cite as *State v. Bachman*, 2010-Ohio-5804.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RONALD D. BACHMAN

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010 CA 00119

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 1995 CR 00300

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 22, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Ronald Dale Bachman appeals the decision of the Stark County Court of Common Pleas denying his motion for leave to file a motion for new trial.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 4, 1995, the Stark County Grand Jury indicted appellant, Ronald Bachman, on four counts of rape, one count of sexual battery, one count of corruption of a minor and one count of gross sexual imposition. The four counts of rape each contained a force specification. These charges were based on allegations that Appellant had sexually abused his daughter from the time she was five years old.

{¶3} Appellant was tried before a jury, which found him guilty as charged in the indictment.

{¶4} By Judgment Entry filed July 27, 1995, and a Nunc Pro Tunc Entry filed August 29, 1995, the trial court sentenced appellant to the mandatory life sentences on the four rape convictions and imposed a determinate term of two years on all the remaining charges. The sentences were then either merged or imposed to run concurrently with each other.

{¶5} In April, 2004, an action was filed in the Stark County Court of Common Pleas recommending that Appellant be classified as a sexual predator.

{¶6} On April 12, 2004, a hearing was held to determine Appellant's status pursuant to the Sex Offender Registration Act, R.C. Chapter 2950. By judgment entry filed April 20, 2004, the trial court classified appellant as a "sexual predator."

{¶7} Appellant filed an appeal and this Court upheld such classification.[1]

[1] State v. Bachman, Stark App. No. 2004-CA-00123, 2004-Ohio-6970.

{¶8} On March 24, 2008, Appellant filed a motion seeking leave to file a motion for a new trial and also filed his motion for new trial.

{¶9} By Judgment Entry filed April 29, 2010, the trial court denied Appellant's motion for new trial.

{¶10} Appellant now appeals, raising the following sole assignment of error:

ASSIGNMENT OF ERROR

{¶11} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL ON UNTIMELINESS GROUNDS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

I.

{¶12} Appellant claims the trial court erred in denying his motion for leave. We disagree.

{¶13} The trial court, in its entry denying Appellant's motion, found that such motion was filed out of time and that Appellant had failed to establish by clear and convincing evidence that he was unavoidably prevented from filing his motion for new trial within the time provided by Crim.R. 33(B).

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

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

{¶16} "(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;

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

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

{¶19} "(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;

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

{¶21} "(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.

{¶22} "(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.

{¶23} "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* * * "

{¶24} 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.

{¶25} 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.

{¶26} 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:

{¶27} "(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.

{¶28} In the instant case, appellant filed his motion for new trial nearly thirteen years after his conviction and sentence.

{¶29} According to Appellant, in October, 1999, he became aware that one of the State's exhibits may have been admitted with a portion of a medical report included

which the trial court had ruled was inadmissible. Appellant attaches to his motion a copy of the correspondence he received from the Court Administrator stating that enclosed therewith was a copy of State's Exhibit 1 containing 11 pages, which according to the record should only have consisted of one page, the cover page.

{¶30} At that time, on November 15, 1999 and December 21, 1999, Appellant filed an App.R. 26(B) application to reopen his appeal. On February 29, 2000, the State filed its response. The trial court denied the Application for Reopening on March 8, 2000.

{¶31} Appellant appealed the denial to the Ohio Supreme Court. The State of Ohio filed a memorandum in Opposition to Jurisdiction on April 20, 2000. The Ohio Supreme Court denied certiorari and refused to accept the appeal.

{¶32} It is through this April 20, 2000, filing by the State of Ohio, which Appellant now argues a "record was created that states affirmatively that the Exhibit was presented to the jury." (Appellant's brief at 8).

{¶33} Appellant argues that the trial court abused its discretion in denying him the above requested relief claiming he was unavoidably prevented from discovering this "newly discovered evidence" due to problems in getting a copy of the State's exhibit from the clerk.

{¶34} Upon review, however, we find that Appellant was aware of this claim as far back as October 7, 1999, when he received a copy of such exhibit from the Court Administrator. Appellant raised this claim in both his motion to reopen his appeal filed in this Court and in his appeal to the Ohio Supreme Court. It is therefore clear that Appellant has been cognizant of the basis for the instant claim as far back late 1999, or

early 2000. Appellant has therefore failed to demonstrate by clear and convincing evidence how he was unavoidably prevented from discovering this claim for the past ten years.

{¶35} Based on the foregoing, we find Appellant's sole assignment of error not well-taken.

{¶36} Appellant's sole assignment of error is overruled.

{¶37} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 1110

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RONALD D. BACHMAN	:	
Defendant-Appellant	:	Case No. 2010 CA 00119

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES