

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-VS-	:	
	:	Case No. 2014CA00198
RONALD DALE BACHMAN	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 1995- CR-0300
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	May 26, 2015
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APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant Ronald Bachman appeals the October 24, 2014 judgment entry of the Stark County Court of Common Pleas denying his motion for leave to file a motion for new trial and denying his motion to disqualify the Stark County Prosecutor's Office. Plaintiff-appellee is the State of Ohio.

Facts & Procedural History

{¶2} On April 4, 1995, a Stark County Grand Jury indicted appellant 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 sexually abused his daughter from the time she was five years old. Appellant was tried before a jury, which found him guilty as charged in the indictment.

{¶3} 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. This court affirmed appellant's conviction in *State v. Bachman*, 5th Dist. Stark No. 1995CA00266, 1996 WL 570854 (Sept. 23, 1996), *appeal denied*, 77 Ohio St.3d 1543, 674 N.E.2d 1183 (1997).

{¶4} In 1999, appellant filed an App.R. 26(B) application to reopen his appeal. The application for reopening was denied on March 8, 2000. Appellant appealed the denial to the Ohio Supreme Court. The Ohio Supreme Court then declined to accept

appellant's case for further direct review. *State v. Bachman*, 89 Ohio St.3d 1409, 729 N.E.2d 381 (2000).

{¶5} In April of 2004, an action was filed in the Stark County Court of Common Pleas recommending appellant be classified as a sexual predator. 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 on April 20, 2004, the trial court classified appellant a sexual predator. Appellant filed an appeal and this Court upheld such classification in *State v. Bachman*, 5th Dist. Stark No. 2004 CA 00123, 2004-Ohio-6970, appeal denied, 105 Ohio St.3d 1470, 2005-Ohio-1186, 824 N.E.2d 541; See also *Bachman v. Bagley*, 487 F.3d 979 (6th Cir. 2007) (upholding dismissal on timeliness grounds of Bachman's federal habeas corpus petition challenging his sexual predator classification).

{¶6} 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. Appellant argued that one of the State's exhibits was admitted with a portion of a medical report included which the trial court had ruled was inadmissible. The trial court denied appellant's motions on April 29, 2010. This Court affirmed the trial court's ruling in *State v. Bachman*, 5th Dist. Stark No. 2010-CA-00119, 2010-Ohio-5804, appeal denied, 128 Ohio St.3d 1444, 2011-Ohio-1618, 944 N.E.2d 694; see also *State ex rel Bachman v. Heath*, 5th Dist. Stark No. 2010-CA-00094, 2010-Ohio-3859 (dismissing as moot appellant's complaint for a writ of procedendo concerning his motions for a new trial).

{¶7} In 2010, appellant filed a motion for resentencing, arguing his sentence was void due to the alleged improper imposition of court costs. On April 23, 2011, the

trial court notified appellant of a limited resentencing hearing solely on the imposition of court costs. The video resentencing was scheduled for May 3, 2011. On April 29, 2011, appellant filed a sentencing memorandum and a motion for mistrial. On May 3, 2011, the trial court resentenced appellant, and via judgment entry on May 11, 2011, denied appellant's sentencing memorandum and motion for mistrial. The trial court further denied appellant's waiver of court costs. This Court affirmed the trial court's judgment on appeal. *State v. Bachman*, 5th Dist. Stark No. 2011-CA-00125, 2011-Ohio-6151, appeal denied, 131 Ohio St.3d 1474, 2012-Ohio-896, 962 N.E.2d 804.

{¶8} In 2013, appellant filed a motion for leave to file a delayed motion for new trial and a motion for new trial based on newly discovered evidence. Appellant argued that he discovered evidence that his wife at the time of his arrest motivated his daughter to come forward to report appellant's sexual abuse. Appellant stated that he contacted a paralegal service in June of 2013 to request information and assistance to prepare for a hearing with the Ohio Adult Parole Authority. The paralegal service filed a records request with the Ohio Department of Rehabilitation and Correction to obtain information available from the Ohio Adult Parole Authority. In July of 2013, appellant received an "Ohio Parole Board Information Sheet" that stated as follows: "According to documents in the Stark County Prosecutor's Office, on March 12, 1995, the victim and her mother reported to the Stark County Department of Human Services and told caseworker that defendant had been sexually molesting the victim since she was five years old."

{¶9} Appellant argued this documentation shows that the prosecutor and Department of Human Services hid the fact that his ex-wife was involved with the filing of the complaint against him, despite the fact that the prosecutor said in the opening

statement at trial that his ex-wife was not supportive of the victim. Appellant contended this newly-discovered evidence showed that his ex-wife was supportive of the victim and that his defense counsel based his strategy on the belief that the victim disclosed the abuse to a teacher and a counselor.

{¶10} In addition, appellant also filed a motion to disqualify the Stark County Prosecutor's Office from opposing his motions for new trial. Appellant argued the prosecutor's office hid the information about his ex-wife from him.

{¶11} The trial court issued a judgment entry on October 24, 2014 overruling appellant's motions. The trial court found that appellant had access to the information or could have had access to the information in 2005, the date of his first parole hearing; accordingly, appellant did not demonstrate that he had exercised due diligence in discovering the new evidence. Further, the trial court found appellant did not establish that the newly discovered evidence would have changed the outcome of the trial since the new allegation is a variation of the defense originally used, which was conclusively rejected by the jury. Finally, the trial court overruled appellant's motion to disqualify the prosecutor's office, finding he had not demonstrated any prejudice from the prosecutor's office opposing his motions for a new trial.

{¶12} Appellant appeals the October 24, 2014 judgment entry of the Stark County Court of Common Pleas and assigns the following as error:

{¶13} "I. BACHMAN WAS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED LEAVE TO FILE A DELAYED NEW TRIAL MOTION ON

GROUND'S THAT DIRECTLY CONTRADICT OHIO SUPREME COURT AND UNITED STATES SUPREME COURT PRECEDENT.

{¶14} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF BACHMAN WHEN IT DENIED BACHMAN'S MOTION TO DISQUALIFY THE STARK COUNTY PROSECUTOR'S OFFICE."

I.

{¶15} A trial court's decision to grant or deny a motion for leave to file a delayed motion for new trial will not be reversed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶16} In this case, appellant bases his motion on allegedly newly discovered evidence. Criminal Rule 33(B) provides that 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 from the trial court's decision unless "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." Criminal Rule 33(B). Thus, an untimely motion for a new trial based on newly discovered evidence must show, by clear and convincing proof, that the defendant was unavoidably prevented from discovering the new evidence. *State v. Tyson*, 5th Dist. Stark No. 2008-CA-00068, 2009-Ohio-104. Clear and convincing proof is that "which will produce in the mind of

the trier of facts a firm belief of conviction as to the facts sought to be established.”

Schiebel, 55 Ohio St.3d at 74.

{¶17} In *State v. Petro*, the Supreme Court of Ohio held the following:

To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence: (1) discloses a strong possibility 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.

148 Ohio St. 505, 76 N.E.2d 370, syllabus (1947).

{¶18} Appellant asserts that he was unavoidably prevented from discovering the new evidence that warrants a new trial. We disagree. The evidence appellant claims is “newly discovered” is information contained on the Ohio Parole Board’s Information Sheet and is information that the disclosure of appellant’s sexual abuse of his daughter took place on March 12, 1995 and involved his daughter and her mother, as opposed to the evidence and testimony at trial that the victim disclosed to a boyfriend on March 12, 1995, who convinced her to disclose at school.

{¶19} As admitted by appellant in his own motion, the information contained in the information sheet was available since 2005, the date of his first parole board hearing, and at subsequent parole board hearings in 2008, 2010, and 2012. Appellant either had access to this information or could have had access via a public records

request, similar to the one he made in 2013. The affidavit of appellant does not provide any explanation as to why the information was not or could not have been obtained in 2005 or explain the lengthy delay. The mere fact of appellant's incarceration does not amount to clear and convincing evidence that he was unavoidably prevented from discovering the evidence. *State v. Parker*, 178 Ohio App.3d 574, 577-78, 899 N.E.2d 183 (2nd Dist. 2008). Appellant has not exercised due diligence in obtaining this information sheet and has not offered viable reasons why he could not. Accordingly, we find the trial court did not abuse its discretion in finding appellant failed, by clear and convincing proof, to demonstrate he was unavoidably prevented from discovering the new evidence.

{¶20} The trial court further determined that even if it were to consider the affidavit, it would not support a finding appellant was entitled to a new trial. We agree.

{¶21} Appellant claims information that his former wife was involved in the disclosure of the sexual abuse of his daughter would have altered his defense strategy. We first note that the accuracy and the source of the information in the Ohio Parole Board information sheet is unclear. However, even if the information contained in the information sheet is accurate, his newly-proposed defense is simply a variation of the defense he presented at trial – that his daughter made up the allegations to get back at him for interfering in her relationship with her boyfriend and to get back at appellant for having an affair and breaking up their family. The victim testified at trial, as did appellant. Appellant attempted to discredit the victim during the trial. Appellant denied ever having any kind of sex with the victim and asserted the victim's accusations were motivated by his disapproval of her boyfriend and by the victim's disapproval of

appellant's affair with another woman. The jury rejected appellant's defense and found the victim credible, thereby finding appellant guilty of the charges in the indictment. Based upon the fact that the defense strategy appellant proposes is a variation of the one he already presented a trial, the alleged newly-discovered evidence does not disclose a strong possibility that it will change the result if a new trial is granted,

{¶22} Accordingly, we find the trial court did not abuse its discretion when it determined that even if it were to consider the affidavit, it would not support a finding appellant was entitled to a new trial. Appellant's first assignment of error is overruled.

II.

{¶23} Appellant argues that the trial court erred in denying his motion to disqualify the Stark County Prosecutor's Office from responding to or opposing his motions for new trial.

{¶24} When reviewing an allegation of a prosecutor's misconduct or disqualification, the reviewing court must review the matter on a case-by-case basis. *State v. Morris*, 5th Dist. Stark No. 2004CA00232, 2005-Ohio-4967. The mere appearance of impropriety is insufficient to warrant the disqualification of an entire prosecutor's office. A decree disqualifying the prosecutor's office should only be issued by a court when actual prejudice is demonstrated. *Id.* Such challenges are usually in the context of a prosecutor who has previously represented a defendant, thus potentially creating an appearance of a conflict of interest. See, e.g. *State v. Freeman*, 20 Ohio St.3d 55, 485 N.E.2d 1043 (1985). In these cases, the defendant has the burden of demonstrating an actual conflict of interest in order to have the prosecutor's office removed. *Id.* Another common challenge is where a prosecutor testifies in a

proceeding or trial that he or she is prosecuting. The ultimate question is whether the defendant was prejudiced. *Id.* Appellant's claim is neither of these scenarios and is based upon the alleged "hiding" of information by the prosecutor's office and appellant's issues with the prosecutor's previous responses and oppositions to his motions and appeals.

{¶25} Based upon our review of the record, we conclude that appellant has failed to meet his burden of demonstrating actual prejudice and the trial court did not abuse its discretion in denying appellant's motion to disqualify the prosecutor's office from responding to or opposing his motion for leave to file a motion for new trial and motion for new trial. Appellant's second assignment of error is overruled.

{¶26} Based upon the foregoing, we overrule appellant's first and second assignments of error and affirm the October 24, 2014 judgment entry of the Stark County Court of Common Pleas.

By Gwin, P.J.,

Delaney J., and

Baldwin, J., concur