[Cite as *State v. Williams*, 2010-Ohio-5888.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1091

Appellee — Trial Court No. CR0199306409

v.

Marlon Maurice Williams — **DECISION AND JUDGMENT**

Appellant — Decided: December 3, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Marlon M. Williams, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from the Lucas County Court of Common Pleas, which denied pro se appellant's motion for leave to file a delayed motion for a new trial due to his failure to comply with Crim.R. 33. For the reasons below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Marlon Williams, sets forth the following sole assignment of error:

{¶ 3} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN REFUSING TO GRANT LEAVE TO FILE A DELAYED MOTION FOR A NEW TRIAL, WITHOUT FIRST CONDUCTING A HEARING"

{¶ 4} The following undisputed facts are relevant to the issue raised on appeal. On July 30, 1993, appellant was indicted for one count of attempted murder with a firearm specification and one count of murder with a firearm specification stemming from a shooting that took place on May 13, 1993. Darnell Williams, brother of appellant, was killed in the shooting and another victim, Anthony Flunder, was wounded. Appellant was found guilty of all charges by a jury in December 1993.

{¶ 5} Appellant appealed, arguing that his conviction was against the manifest weight of the evidence. This court affirmed his conviction, holding in relevant part that: (1) Flunder and one other witness testified that they saw appellant shoot at Flunder several times; (2) another witness saw appellant flash a gun; (3) another witness testified to seeing appellant shoot Flunder and noticed that one of appellant's gunshots hit Darnell; (4) the bullets recovered from both bodies came from the same gun; and (5) shell casings found in the area of the shooting likewise came from the same gun. *State v. Williams* (Dec. 16, 1994), 6th Dist. No. L-93-366.

{¶ 6} It should be noted that appellant has filed three petitions for postconviction relief. All of these have been found to be without merit. In addition, all petitions were in

connection to Flunder's medical records. On November 4, 2009, appellant filed a "Motion for Leave to File Delayed Motion for a New Trial." Appellant claimed to have found evidence of a 911 call from the day of the shooting and once again was attempting to obtain the medical records of Flunder. This was denied by the trial court on January 22, 2010, due to appellant's failure to comply with Crim.R. 33. Appellant has filed a delayed appeal to this court.

{¶ 7} In his sole assignment of error, appellant claims that the trial court erred and abused its discretion in refusing to grant leave to file a delayed motion for a new trial. Specifically, appellant seeks a new trial based on alleged "new evidence" that he speculates, without any supporting evidentiary or legal basis, could acquit him of all charges.

{¶ 8} The term abuse of discretion connotes an unreasonable, arbitrary or unconscionable attitude by the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In reviewing the trial court's refusal to grant leave to file a motion for a new trial, we will examine the record to determine whether appellant presented "clear and convincing" evidence that he was unavoidably prevented from discovering the evidence. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. However, we cannot substitute our judgment for that of the trial court when competent credible evidence supports the trial court's decision. Id.

{¶ 9} The governing rule here is Crim.R. 33(A)(6), which states that a new trial may be granted on motion of the defendant when new evidence is discovered which the

defendant could not with reasonable diligence have discovered and produced at trial. Furthermore, motions for a new trial on account of newly discovered evidence shall be filed within 120 days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. Crim.R. 33(B). The exception to this is when it is shown by clear and convincing proof that defendant was unavoidably prevented from the discovery of the evidence relied upon. Id.

{¶ 10} In this case, appellant claims that he was unable to obtain certain evidence within the 120 day period and, because of this, should be able to file a motion for a new trial. This court disagrees. Although appellant states that he was unable to obtain copies of the trial transcript until early 2000, the record reflects that his appellate counsel was in possession and utilized copies of the transcript during his unsuccessful appeal in 1994.

{¶ 11} The 911 call printout was consistent with the testimony at trial and therefore does not constitute new evidence. The hospital records that appellant is attempting to obtain were admitted during trial as evidence and are therefore, not newly discovered evidence. None of the evidence described by appellant constitutes new evidence. The record reflects that the evidence which appellant purports to constitute "new evidence" is either consistent with prior testimony or was previously admitted into evidence at trial. The record reflects that the evidence cited by appellant in support of the disputed motion was already present in the record and cannot be construed as newly discovered evidence. As such, there is no clear and convincing evidence that appellant

was unavoidably prevented from filing his motion within 120 days of his conviction. Appellant's assignment of error is not well-taken.

{¶ 12} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.