

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

State of Ohio

Court of Appeals No. L-10-1191

Appellee

Trial Court No. CR0200501209

v.

Verdell Starks

DECISION AND JUDGMENT

Appellant

Decided: April 8, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Verdell Starks, pro se.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, pro se, Verdell Starks, appeals from a denial of his motion for a new trial on the basis of newly discovered evidence entered by the Lucas County Court of Common Pleas. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} The relevant facts and partial procedural history of this case were set forth by this court in *State v. Starks*, 6th Dist Nos. L-05-1417, L-05-1419, 2007-Ohio-4897, as follows:

{¶ 3} "On August 23, 2004, an African-American male wearing a wig, baseball cap and large tinted glasses entered a Toledo Cash Advance store. The man pointed what appeared to be a gun wrapped in cloth at the office manager, gesturing to the counter where the money was kept. He said, 'You have three seconds.' The manager opened the cash drawer and handed over a little over \$200. The robber fled.

{¶ 4} "A week later, an African-American male wearing a shoulder length wig came into a Toledo BP station, jumped the counter and grabbed the attendant, pointing a gun at her head. The robber pushed the attendant to the cash register and ordered her to open it. When she did, he grabbed the money, slightly under \$200, ordered the attendant into a back room and fled.

{¶ 5} "On September 26, 2004, a gunman wearing a hooded sweatshirt and large tinted glasses entered a Toledo Sunoco station, telling the attendant that she had ten seconds to open the cash drawer. The man took the bills in the cash drawer, under \$100, and left, telling the attendant to, 'have a good night.'

{¶ 6} "On September 30, 2004, an African-American male carrying a handbag and wearing a blue dress, a wig and tennis shoes entered a South Toledo branch of Sky Bank. With a curved object wrapped in a sock in his right hand, the robber leaped the counter, pushed aside the teller and emptied the contents of her drawer into his handbag.

Following this, he jumped on the counter, stood, turned and told everyone to, 'Have a good day'. He then fled with more than \$1,000.

{¶ 7} "Police and FBI investigating the bank robbery found a sheet of paper in the secure area behind the bank's counter. It was a worker document for one Andrea Starks. Sky Bank ascertained that Andrea Starks was not a customer. A review of bank security photographs revealed that when the robber entered the bank he was carrying a piece of paper. When he left, the paper was no longer visible.

{¶ 8} "Andrea Starks is the spouse of appellant, Verdell Starks. Investigators believed that appellant matched the description given by witnesses in all four robberies. Police assembled a photo array, containing pictures of six men, including appellant, and showed the array to witnesses. Each of the witnesses picked appellant from the array.

{¶ 9} "Appellant was arrested and, in an interrogation with the FBI, confessed to the bank robbery. On October 14, 2004, appellant was named in an indictment charging two counts of aggravated robbery with firearm specifications and two counts of robbery. The indictment included the Sunoco station robbery for which he was eventually convicted. On January 28, 2005, a second indictment was handed down, charging appellant with an additional four counts of aggravated robbery with firearm specifications and four counts of robbery. Included in this indictment were the Sky Bank, Cash Advance, and BP robberies. These cases were consolidated for trial.

{¶ 10} "Appellant pled not guilty and moved to suppress witness identification and his statements to police. He also moved to sever the bank robbery case from the rest of

the charges. The trial court denied appellant's suppression motion, but granted severance. A subsequent motion to sever the remaining armed robbery charges from each other was denied.

{¶ 11} "Following a jury trial, appellant was convicted of the bank robbery. Before trial for the remaining armed robbery charges, appellant dismissed his counsel and elected to proceed as his own trial counsel, with a court-appointed backup counsel to provide aid. Following another jury trial, appellant was found guilty of three counts of aggravated robbery with two firearm specifications.

{¶ 12} "The trial court denied appellant's motion for a new trial and, following a presentence investigation, sentenced him to a four-year period of incarceration for the bank robbery, to be served consecutively to five years for the Sunoco robbery, five years for the BP robbery and two consecutive three-year terms for the firearm specifications. An additional concurrent five-year sentence was imposed for the Cash Advance robbery. The remaining counts in the indictment were dismissed prior to or during trial."

{¶ 13} On July 3, 2008, appellant filed a motion for new trial on the basis of newly discovered evidence in the above-captioned case. The motion related to appellant's conviction for aggravated robbery at the Cash Advance store on August 23, 2004. An evidentiary hearing on the matter was held on October 23, 2009. Appellant represented himself at the hearing with standby counsel present. At the hearing, appellant presented affidavits and testimony by Robert Finley and Dennison Bower, III. Finley testified that

he was the person who robbed the Cash Advance store on August 23, 2004, and Bower testified that Finley told him that Finley had robbed the Cash Advance store.

{¶ 14} In an opinion and judgment entry dated June 10, 2010, the trial court denied appellant's motion for new trial, finding that both Finley and Bower's testimony lacked credibility. Specifically, the trial court pointed to inconsistencies in Finley's testimony; the fact that Finley has a lengthy record of convictions of serious crime that significantly impeach his record; the fact that many of Finley's answers came in response to leading questions by appellant; the fact that Finley's affidavit, purportedly prepared by Finley himself, was similar in format to the statements and pleadings submitted by appellant, acting pro se; the questionable nature of the accuracy of Finley's memory; the lack of reasonableness of some of Finley's testimony; and the lack of a prior admission on the part of Finley to the Cash Advance store robbery. The trial court gave no weight to Bower's testimony, because Bower's testimony depended upon Finley's credibility, which the court found to be lacking.

{¶ 15} The trial court additionally pointed out that it had presided over appellant's trial and heard the testimony of the victim in the Cash Advance robbery. Further, the trial court stated that the victim was a strong witness, who had no doubt that appellant was the man who robbed her. Upon weighing her testimony along with all of the other evidence presented at trial against the newly discovered evidence provided by appellant, the trial court concluded that the evidence did not disclose a strong probability that it would

change the result if a new trial were granted. On that basis, the trial court denied appellant's motion for a new trial.

{¶ 16} Appellant timely appealed, raising the following assignments of error:

{¶ 17} I. "The Trial Court abused its discretion and violated Appellant's right to due process as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution when the Trial Court denied Appellant's Motion for New Trial Based on Newly Discovered Evidence that was exculpatory, including the corroborating existence of another person who has confessed to the crime."

{¶ 18} II. "The Trial Court abused its discretion when it granted the State's untimely request for an extension of time to respond to Appellant's Crim.R. 33 Motion when such extension was precluded by Crim.R. 45(B)."

{¶ 19} III. "The Trial Court abused its discretion by considering and granting the State's Motion for Extension of Time to File Response in the absence of a showing of clear excusable neglect."

{¶ 20} IV. "The Trial Court abused its discretion by granting the State's motion for extension of time prior to giving the Appellant an opportunity to respond by local rule denied [sic] Appellant his right to due process.

{¶ 21} V. "The Trial Court abused its discretion when the Trial Court denied Appellant's request for a motion for new consolidated trial based upon newly discovered evidence."

{¶ 22} Because appellant's first and fifth assignments of error involve overlapping issues, they will be considered together in this analysis. Appellant's argument with respect to these assignments of error is, essentially, that this is a case of mistaken identity. In support of this position, appellant points to the fact that police suspected only one person had committed most of the "similar robberies" that had taken place around the summer of 2004 and that Finley confessed to three to four robberies which happened in 2004.

{¶ 23} In order for a new trial based upon newly discovered evidence to be justified, the newly discovered evidence must satisfy several criteria. That is, a trial court evaluating such a matter must consider whether the new evidence:

{¶ 24} "(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, syllabus.

{¶ 25} An appellate court will not reverse a trial court's decision concerning a motion for new trial unless there has been a gross abuse of that discretion, which abuse is disclosed by the record. *Id.* at 507-508.

{¶ 26} The law is well-settled that the credibility of witnesses is normally within the province of the trial judge. *State v. Williams*, 2d Dist. No. 19854, 2004-Ohio-3135, ¶ 17. Thus, the trial court may in the exercise of its discretion determine new witness

testimony to be false. Cf. *id.* (holding that it is within a trial court's discretion to determine a recantation to be false).

{¶ 27} Here, the trial court reasonably determined, based upon a totality of the circumstances, that the testimony of Finley and was not credible. Accordingly, we find that the trial court, likewise, reasonably determined that the evidence submitted by appellant in support of his motion did not create a strong probability that it would change the result if a new trial were granted.

{¶ 28} For the foregoing reasons, appellant's first and fifth assignments of error are found not well-taken.

{¶ 29} Appellant's second, third, and fourth assignments of error all involve a claim that the trial court erred when it granted the state an extension of time to respond to appellant's supplemental memorandum filed in support of his motion for a new trial.

{¶ 30} Appellant filed his supplemental memorandum on December 11, 2009. According to appellant, the trial court ordered that the state's response be filed within three weeks after the filing of appellant's memorandum.

{¶ 31} On February 24, 2010, after the purported three-week deadline, the state filed a motion seeking an extension of time to respond to supplemental memorandum. Attached to the motion was an affidavit filed by assistant prosecuting attorney Brenda Majdalani, wherein she testified that she had not been served with a copy of appellant's memorandum, and that she first became aware of the supplemental memorandum on or about February 17, 2010.

{¶ 32} On March 3, 2010, the court granted the state's motion. The same day, appellant filed an objection to the state's motion. Attached to the objection was an affidavit, sworn by appellant, stating that on December 11, 2009, the state was, in fact, served with a copy of his supplemental memorandum.

{¶ 33} The law provides that a trial court has discretion in permitting a party to file a pleading outside of the time guidelines set forth in the civil rules. *Kott Enterprises, LTD v. Brady*, 6th Dist. No. L-03-1342, 2004-Ohio-7160, ¶ 37. Civ.R. 6, which governs extensions of time, pertinently provides: "When by these rules * * * an act is required * * * to be done * * * within a specified time, the court for cause shown may at any time in its discretion * * * 2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Civ.R. 6(B).

{¶ 34} Here, the undisputed evidence shows that, regardless of whether "the state" timely received service of appellant's supplemental memorandum, assistant prosecuting attorney Majdalani, who acted as the state's representative in this matter, did not. In this case, we find that the prosecutor's failure to timely respond to a motion that she herself did not receive is reasonably characterized as "excusable neglect." Accordingly, we conclude that the trial court did not abuse its discretion in allowing the state an extension of time in which to respond.

{¶ 35} Appellant additionally argues that the trial court erred in failing to give him fourteen days in order to respond to the state's request for an extension of time.

{¶ 36} Loc.R. 5.04 of the Court of Common Pleas of Lucas County relevantly provides that after a motion has been filed and served on a party, "[a]n opposing party may serve and file a memorandum in opposition to any motion. The filing shall be made within 14 days after service." Loc.R. 5.04(D).

{¶ 37} On the other hand, Loc.R. 5.05 of the Court of Common Pleas of Lucas County, which deals specifically with routine orders, provides that "[f]or routine matters where no opposition is expected by the adversary or from the court (i.e. motions to allow telephone conferences, scheduling continuances for good cause, etc.) the court may sign the accompanying order before the submission date specified in 5.04(F)." Loc.R. 5.05(A).

{¶ 38} Here, where the issue involves the routine matter of a motion for an extension of time, we find that Loc.R. 5.05, rather than Loc.R. 5.04, is properly applied. Thus, the trial court's ruling upon the state's motion prior to the expiration of 14 days was in compliance with the local rules and was not error.

{¶ 39} Even assuming, *arguendo*, that Loc.R. 5.04 is the applicable rule, and that the timing of the trial court's ruling was therefore in error, because appellant does not offer any evidence to show that his substantial rights were affected by the trial court's granting of the state's motion, we find that any such error was harmless and, therefore, is properly disregarded. See *State v. Houser*, 9th Dist. No. 21555, 2003-Ohio-6811, ¶ 5-7; see also, Crim.R. 52(A).

{¶ 40} For all of the foregoing reasons, appellant's second, third, and fourth assignments of error are found not well-taken.

{¶ 41} 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.

Peter M. Handwork, 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.
