[Cite as *State v. Blakely*, 2013-Ohio-1080.]

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

State of Ohio

Appellee

v.

Eugene Blakely, Jr.

Appellant

Court of Appeals Nos. L-12-1034
L-12-1074

Trial Court No. CR0200203089

DECISION AND JUDGMENT

Decided: March 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Eugene Blakely, Jr., pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} We consider the consolidated appeal of appellant, Eugene Blakely, Jr., in appellate case Nos. L-12-1034 and L-12-1074. Both appeals relate to appellant's conviction on a single count of murder with a firearm specification (a violation of R.C. 2903.02(A) with an R.C. 2941.145 specification). The conviction is based upon a guilty

verdict returned at trial by a jury in the Lucas County Court of Common Pleas. The trial court filed the original judgment of conviction and sentence on September 2, 2003. On direct appeal, we affirmed in *State v. Blakely*, 6th Dist. No. L-03-1275, 2006-Ohio-185, *appeal denied*, 109 Ohio St.3d 1495, 2006-Ohio-2762, 848 N.E.2d 858.

{¶ 2} Subsequently, the trial court issued a nunc pro tunc judgment modifying the original judgment to state the manner of conviction. We dismissed an appeal from entry of the nunc pro tunc judgment in *State v. Blakely*, 6th Dist. No. L-10-1311, 2012-Ohio-4190.

{¶ 3} In these appeals, appellant challenges the trial court's denial of his Crim.R. 33(B) motion for leave to file a delayed motion for a new trial. The motion is based upon a claim of newly discovered evidence. Appellant filed the motion on July 21, 2011. The trial court denied the motion in a judgment filed on January 11, 2012. Appellant appeals that judgment in case No. L-12-1034.

{¶ 4} Appellant also filed a motion requesting the trial court to issue findings of fact with respect to the January 11, 2012 judgment denying his motion for leave to file. The trial court denied that motion in a March 6, 2012 judgment. Appellant appeals the denial of the motion for findings of fact in case No. L-12-1074.

{¶ 5} Appellant asserts four assignments of error on appeal:

> Assignment of Error No. I. The Lucas County Court of Common Pleas erred to the prejudice of appellant when it failed to find appellant unavoidably prevented from filing his Crim. R. 33 motion to the trial court

pursuant to Crim. R. 33 (B) where the facts as presented were newly discovered and newly presented by appellant after the Crim.R. 33 deadline.

Assignment of Error No. II. The Lucas County Court of Common Pleas abused its discretion and erred to the prejudice of appellant when it failed to allow appellant to be present in the hearing held on his motion for leave to file a delayed motion for a new trial where appellant has clearly shown prosecutorial misconduct.

Assignment of Error No. III. The Lucas County Common Pleas Court erred to the prejudice of appellant and abused its discretion in failing to allow appellant to be present at an evidentiary hearing which he would have shown trial counsel was wholly ineffective and failed to investigate the prosecution's claim in use of subpoena process.

Assignment of Error No. IV. The Lucas County Court of Common Pleas' ruling on appellant's motion for leave to file a delayed motion for a new trial was arbitrary and unreasonable to the prejudice of appellant where the court failed to refer to the actual (full) record before denying his claim.

Crim.R. 33

{¶ 6} Under Crim.R. 33(A)(6), a motion for a new trial may be granted "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(B) sets time limits for filing motions based upon newly discovered evidence:

> 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. Crim.R. 33(B). (Emphasis added.)

{¶ 7} The jury verdict on which appellant's conviction is based was returned on September 2, 2003. Appellant filed his motion seeking leave of court to file a delayed motion for a new trial based upon newly discovered evidence on July 21, 2011—more than seven years after the jury verdict.

Evidence at Trial

{¶ 8} Appellant's first trial ended with a hung jury. Camille Crawford was a key prosecution witness against appellant in the first trial but failed to appear to testify at the second trial. At the second trial, the court permitted the state to read into evidence the transcript of Crawford's testimony at the first trial. The court ruled that the testimony was admissible under Evid.R. 804(B)(1), a hearsay exception.

{¶ 9} Crawford's testimony was central to the prosecution's case against appellant. We summarized Crawford's testimony in appellant's direct appeal:

Crawford's admitted testimony contained the following facts:

> Crawford had been an acquaintance of appellant for several months when, on the night of August 29, 2002, at approximately 2:55 a.m., she called appellant to pick her up for a ride. He did so shortly after her call, and together they drove to the Weiler Homes. Crawford testified that appellant then left her alone for approximately three to four minutes; during those minutes, she heard five or six gunshots. Shortly after the gunshots, appellant ran back to where Crawford was sitting outside a Weiler Homes building. She said appellant had a silver gun in his hand, and was repeating, "come on, let's go, let's go, we got to go." Crawford then left with appellant in his car, and appellant took her to her home, dropped her off, then returned after approximately an hour. When he returned, he told Crawford that he had killed McMillan, because he "owed him"-for what, Crawford was unsure. A few days later, appellant telephoned Crawford and told her that he was in Chicago. Crawford contacted police approximately one week after the shooting. *Blakely I* at ¶ 21.

{¶ 10} The hearsay exception under Evid.R. 804(B)(1) is limited to circumstances where the declarant is unavailable to testify. Evid.R. 804(B). Evid.R. 804(A) provides a series of definitions of "unavailability" for purposes of the rule. One definition is provided under Evid.R. 804(A)(5):

(A) Definition of unavailability

"Unavailability as a witness" includes any of the following situations in which the declarant:

* * *

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

{¶ 11} The state argued at the second trial that Crawford was unavailable as a witness despite efforts to procure her attendance to testify by subpoena and by other reasonable means. We considered the issue in the direct appeal. We recognized in *Blakely I* that appellant disputed that Crawford was unavailable under Evid.R. 804 and we considered whether the prosecution demonstrated a reasonable good faith effort to secure her presence at trial. *Id.* at ¶ 32. We identified relevant evidence on the issue in *Blakely I*:

Three subpoenas were issued, dated as follows: (1) served July 7, 2003, to appear July 8, 2003; (2) served August 4, 2003, to appear August 18, 2003; (3) served August 20, 2003, to appear August 25, 2003. A material witness warrant for Crawford was requested and issued on August 20. Appellant argues that because the subpoenas were issued to Detective Quinn, instead of to Crawford directly, and because the state

failed to serve either the August 25 trial subpoena or the material witness warrant upon her, the state failed to act "with diligence" to secure her attendance. We find this argument without merit.

Quinn testified, under oath, that he had served the subpoena issued August 4 upon Crawford, and had spoken to her, and she had promised to attend the August 18 trial. However, she did not attend, and the trial was continued to August 25. Quinn then testified that he was unable to serve that subpoena upon Crawford, despite repeated visits to her residence; during that time, he spoke to her twice by telephone, and she had verbally promised to testify at the August 25 trial. On August 20, notified of Quinn's unsuccessful efforts to locate Crawford, the prosecutor requested the court to issue a material witness warrant to secure Crawford's attendance, and said warrant was in fact issued that same day. Quinn testified that he repeatedly attempted to serve that warrant and was unsuccessful in locating Crawford. He and other detectives also attempted to locate Crawford at places other than her residence, such as hospitals and the coroner's office, and also contacted Crawford's known acquaintances during their search. *Id*. at ¶ 33-34.

{¶ 12} We held in *Blakely I* that the trial court did not err in admitting Crawford's prior testimony (testimony in the first trial) at the second trial pursuant to Evid.R. 804, due to evidence that subpoenas were issued to secure Crawford's attendance to testify

and the testimony by Detective Quinn of efforts undertaken to locate Crawford. *Id.* at ¶ 35.

{¶ 13} Appellant argues under Assignment of Error No. I that he discovered new evidence demonstrating that the state failed to meet its burden of showing unavailability of Crawford to testify under Evid.R. 804(A)(5) and that the trial court erred in denying him leave to file a delayed motion for a new trial. Appellant argues that his motion was timely under Crim.R. 33(B) due to unavoidable delay in the discovery of the new evidence.

{¶ 14} In *State v. Peals*, 6th Dist. No. L-10-1035, 2010-Ohio-5893, ¶ 19-20, this court outlined the analysis undertaken to determine unavoidable delay under Crim.R. 33(B):

> Pursuant to Crim.R. 33(B), a defendant who wishes to file a motion for new trial on account of newly discovered evidence beyond 120 days of the jury's verdict or the court's decision "must seek leave from the trial court to file a 'delayed motion.'" *State v. Unsworth*, 6th Dist. Nos. L-09-1205, L-09-1206, 2010-Ohio-398, ¶ 18; *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959, ¶ 20. As explained by the court in *State v. Parker*, 178 Ohio App.3d 574, 899 N.E.2d 183, 2008-Ohio-5178, ¶ 16:
>
> "In order to be able to file a motion for a new trial based on newly discovered evidence beyond the one hundred and twenty days prescribed in the above rule, a petitioner must first file a motion for leave, showing by

> 'clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.'" *State v. Mo*rgan, Shelby App. No. 17-05-26, 2006-Ohio-145, 2006 WL 93108. "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146, 19 OBR 230, 483 N.E.2d 859.

{¶ 15} Crim.R. 33(A)(6) sets forth grounds for a new trial based upon newly discovered evidence. The rule applies "when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(A)(6). We agree with the state that leave to file was properly denied because appellant has presented no evidence in support of his motion that was not presented at trial.

{¶ 16} The only evidentiary material submitted by appellant in the trial court in support of his motion for leave of court to file a delayed motion for a new trial was his own affidavit. The affidavit does not include any evidence that is not contained in the trial record. Specifically, the affidavit presents no evidence to support appellant's claim that Detective Quinn or the assistant prosecutor misrepresented efforts made by the state to secure Crawford's attendance at the second trial.

{¶ 17} Appellant's motion and affidavit present no prima facie evidence of unavoidable delay occasioned by a delayed discovery of evidence relied upon as the basis to grant a new trial. As no issue of unavoidable delay is presented, the trial court did not err in overruling the motion for leave to file as it is was made well outside the 120-day time requirements of Crim.R. 33(B). *See Peals*, 6th Dist. No. L-10-1035, 2010-Ohio-5893 at ¶ 23; *State v. Brown*, 1st Dist. No. C-10050, 2010-Ohio-4599, ¶ 6; Crim.R. 33(B).

{¶ 18} Accordingly, we find appellant's Assignment of Error No. I not well-taken.

{¶ 19} Appellant's second and third assignments of error are based on claimed error arising from the fact that the trial court conducted an "actual" evidentiary hearing on his motion for leave to file in his absence and without an attorney appearing on his behalf. The state argues in response that appellant is mistaken and the court did not conduct an evidentiary hearing on the motion. We have reviewed the record and agree. Accordingly, we find Assignments of Error Nos. II and III not well-taken.

{¶ 20} Under Assignment of Error No. IV, appellant argues that the trial court ruling denying the motion for leave to file was arbitrary, unreasonable, and an abuse of discretion because the trial court failed to refer to the record in denying the motion for leave to file a motion for a new trial.

{¶ 21} We find the argument is without merit. No prima facie evidence of unavoidable delay was presented on the motion. The trial court was not required to issue findings of fact or conclusions of law on the motion. *State ex rel. Collins v. Pokorny*, 86

Ohio St.3d 70, 711 N.E.2d 683 (1999); *State v. Girts*, 121 Ohio App.3d 539, 566, 700 N.E.2d 395 (8th Dist.1997); *State v. Lawrence*, 2d Dist. No. 24725, 2012-Ohio-837, ¶ 13. Accordingly, we find Assignment of Error No. IV not well-taken.

{¶ 22} We find that justice was afforded the party complaining and affirm the judgments of the Lucas County Court of Common Pleas in this consolidated appeal. We order appellant to pay the costs of the appeals pursuant to App.R. 24.

Judgments 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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE