[Cite as *State v. Redd*, 2013-Ohio-5181.]

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

State of Ohio — Court of Appeals No. L-13-1087

Appellee — Trial Court No. CR0199405082

v.

Steven R. Redd — **DECISION AND JUDGMENT**

Appellant — Decided: November 22, 2013

* * * * *

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

Steven R. Redd, pro se.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Steven Redd, appeals from the trial court's April 16, 2013 decision to deny his "motion for a new trial" and "motion for leave to file for new trial." For the reasons that follow, we affirm the judgment of the trial court.

A. Statement of Facts and Procedural History

{¶ 2} On August 27, 1993, Robert Trexler and Andrea Heron-Trexler were shot and killed outside a convenience store located on the corner of Prospect and Detroit Avenues in Toledo, Ohio. Appellant was charged with their murder. On November 1, 1994, a jury convicted appellant of two counts of aggravated murder, with death penalty and firearm specifications and two counts of aggravated robbery, with firearm specifications. Appellant was sentenced to two consecutive life sentences.

{¶ 3} Following his trial, appellant retained new counsel and appealed the conviction. This court affirmed the conviction in *State v. Redd*, 6th Dist. Lucas No. L-94-330, 1996 WL 139641 (Mar. 29, 1996). In 2001, appellant filed a petition for postconviction relief, which the trial court denied. This court affirmed the decision in *State v. Redd*, 6th Dist. Lucas No. L-00-1148, 2001 WL 1001182 (Aug. 31, 2001).

{¶ 4} Nearly 18 years after his conviction, appellant filed a number of items with the trial court. At issue in this appeal are appellant's November 5, 2012 motion for a new trial and his November 8, 2012 motion for leave to file for new trial. Both motions were filed pro se. The trial court denied both motions by order journalized on April 16, 2013.

{¶ 5} On May 14, 2013, appellant filed a pro se notice of appeal. He asserts three assignments of error for this court's review:

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR NEW TRIAL AND MOTION FOR LEAVE TO FILE FOR NEW TRIAL WITHOUT CONDUCTING AN

EVIDENTIARY HEARING TO DETERMINE IF RECORD CAN BE SETTLED AND TO DETERMINE THAT THE APPELLANT IS NOT AT FAULT.

II. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL.

III. TRIAL COUNSEL [SIC] ABUSED ITS DISCRETION.

B. Analysis

{¶ 6} Crim.R. 33 provides the circumstances under which a new trial may be granted. Crim.R. 33(A) provides, in part,

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

(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;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *

(5) Error of law occurring at the trial;

(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. * * *

{¶ 7} Crim.R. 33(B) prescribes time limits by which a defendant must file his motion. It provides, in part,

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 * * * 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.

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 * * *. 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.

{¶ 8} Thus, the 14 or 120 day post-verdict deadline may be extended but only if the defendant requests and is granted leave of court. "[A] petitioner must first file a motion for leave, showing by clear and convincing proof that he was unavoidably prevented from filing a motion in a timely fashion." (Citations omitted.) *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 16 (6th Dist.). "[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*, 19 Ohio App.3d 141, 145–146, 483 N.E.2d 859 (10th Dist.1984).

{¶ 9} In his first assignment of error, appellant claims that the trial court incorrectly denied his motion for new trial and his motion for leave to file for a new trial without conducting a hearing. Appellant filed his motion for new trial three days before his motion for leave. In its order denying the motions, the trial court did not distinguish between the two. "Although a defendant may file his motion for a new trial along with his request for leave to file such motion, 'the trial court may not consider the merits of the

motion for a new trial until it makes a finding of unavoidable delay.'" *State v. Brown*, 8th Dist. Cuyahoga No. 95252, 2011-Ohio-1080, ¶ 14 quoting *State v. Stevens*, 2d Dist. Montgomery Nos. 23236, 23315, 2010-Ohio-556, ¶ 11. Accordingly, we construe the trial court's order as limited to a denial of appellant's motion for leave. We further emphasize that the merits of appellant's motion for a new trial are not before us.

{¶ 10} An abuse of discretion standard is applied when reviewing a trial court's denial of a motion for leave for new trial. *See State v. Anderson*, 10th Dist. Franklin No. 12AP-133, 2012-Ohio-4733, ¶ 9 and *State v. Ogle*, 4th Dist. Hocking No. 13CA9, 2013-Ohio-3770, ¶ 9. Likewise, "[t]he decision whether to grant or hold an evidentiary hearing on a defendant's motion for leave falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio- 5893, ¶ 23. An abuse of discretion is more than an error of law or judgment; it implies an unreasonable, unconscionable, or arbitrary decision that is "palpably and grossly violative of fact and logic." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

{¶ 11} Appellant failed to articulate which section of Crim.R. 33(A) his motion is based which, in turn, would govern which timeline applied to his motion for leave. Instead, appellant's argument is as follows: "The Appellant's entire appeal was based on fraudulent transcripts that omitted, rearranged, and created false testimony, arguments,

evidence, jury instructions, and prejudicial actions committed by the Courtroom authorities, officials, and homicide detectives." Appellant claims that the 1,724 page transcript is a "totally fictional document."[1]

{¶ 12} We hasten to note that appellant offers no evidence to support his hyperbolic claims, other than his own self-serving affidavit. Likewise, he offers no motive as to why a court reporter would act with such bias, much less, how a court reporter could conceivably carry out such a massive fraud. Instead, appellant uses his 12 page, 101 paragraph affidavit to recreate "the omitted and the incorrect portions" of the transcript based on the "best of [appellant's] recollection" 18 years after the fact. Appellant offers no corroborating statements to substantiate his alternative view of events.

{¶ 13} Of importance to the issue at hand is appellant's failure to seek a new trial within the confines of Crim.R. 33(B). Appellant alleges that his delay was occasioned by his inability to obtain the trial transcript. In his own words,

> [Appellant] performed his "Due Diligence" in attempting to obtain the trial transcripts by (1) requesting a copy of them from the [appellate] counsel * * * numerous times [sic]. (2) by filing a 'Motion for Transcripts at State Expense," in which Appellant did not receive any response from

[1] Appellant did not raise App.R. 9(E) in this appeal. The rule provides relief where "any difference arises as to whether the record truly discloses what occurred in the trial court * * *." Appellant did, however, file with the trial court a "Motion to Create/Correction of Record Pursuant to Appellate Rule 9" on October 12, 2012. The trial court evaluated appellant's arguments under App.R. 9(E) and denied the motion on March 27, 2013. Appellant did not appeal the order.

the court. * * * [and] (3) Appellant's father, James Redd Sr., went to the Courthouse of Lucas County in order to purchase the transcripts but was unable to do so [sic]; *All of this happened between the year 1995-1996*. (Emphasis added.)

{¶ 14} Appellant claims that he received the transcript from the public defender's office in "mid-2012."

{¶ 15} We agree with the state that leave to file was properly denied because appellant has presented no evidence, much less clear and convincing proof, that he was unavoidably prevented from filing a motion for new trial on a timely basis. That is, he has failed to show that he exercised reasonable diligence and despite such reasonable diligence, he 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 frame of the rule. Setting aside the unavoidable conclusion that appellant's allegations do not fall squarely under any of the grounds set forth in Crim.R. 33(A), he has also failed to make a case of unavoidable delay. Indeed, by his own admission, he has not attempted to obtain the transcript since 1995-1996. Appellant has demonstrated an absence of any diligence, much less reasonable diligence, to secure the transcript.

{¶ 16} We have reviewed the contents of the record and find no prima facie evidence of unavoidable delay that would support appellant's motion for leave. Therefore, we find that the trial court did not err in overruling the untimely motion for leave as it is was made well outside the time requirements of Crim.R. 33(B). *See Peals,*

6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893 at ¶ 23; *State v. Brown,* 1st Dist. Hamilton No. C-10050, 2010-Ohio-4599, ¶ 6; Crim.R. 33(B). Appellant's first assignment of error is not well-taken.

{¶ 17} In his second assignment of error, appellant claims that he was denied effective assistance of trial and appellate counsel. As for his trial counsel, appellate claims that his trial lawyer (1) failed to object during a suppression hearing when the detective testified; (2) failed to inform appellant of an alleged plea bargain offer; (3) failed to properly cross-examine "numerous state witnesses"; (4) failed to object when the trial court "failed to give the jury any Jury Instructions"; and (5) conceded appellant's guilt.

{¶ 18} This is appellant's third occasion raising ineffective assistance of trial counsel. He first raised the issue when he appealed his conviction in 1996. *Redd,* 6th Dist. Lucas No. L-94-330, 1996 WL 139641. We rejected the merits of appellant's arguments applying the standards enunciated in *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two and three of the syllabus. Appellant raised the issue a second time in his petition for postconviction relief in 2001. This court found that appellant's claims were barred by the doctrine of res judicata. *Redd,* 6th Dist. Lucas No. L-00-1148, 2001 WL 1001182.

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any

defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 19} Appellant's claims against his trial counsel involve alleged irregularities that occurred during his trial and are part of the trial record. Because appellant could have raised these issues in 1996 during his direct appeal, they are barred by res judicata. *State v. Kelm*, 6th Dist. Wood No. WD-11-024, 2013-Ohio-202, ¶ 9. Therefore, appellant's claim of ineffective assistance of trial counsel under the second assignment of error is barred.

{¶ 20} Appellant also claims that he received ineffective assistance of appellate counsel because his appellate attorney "refused to send him a copy of the transcript on record to be reviewed for accuracy for the purpose of a fair review on appeal." Appellant maintains that he requested the transcript from counsel three times between 1995-1996 but did not receive a response. Because appellant's ineffective assistance arguments were raised via a motion for leave for new trial, he was required to present clear and convincing proof of unavoidable delay. He has failed to so. Therefore, his allegations against his trial and appellate counsel are barred on timeliness grounds pursuant to Crim.R. 33(B).

{¶ 21} In addition, we note that the issue of ineffective assistance of appellate counsel is properly raised by filing an "application for reopening" pursuant to App.R.

26(B). Because appellant failed to follow the procedures set forth in that rule, his claim is not properly before this court, and we decline to address it. We note, however, that this court follows the general rule that "a defendant's inability to obtain or access transcripts is generally insufficient to establish good cause for late filing under App.R. 26(B)." (Citations omitted.) *State v. Quinn*, 6th Dist. Lucas No. L-06-1003, 2011-Ohio-3717, ¶ 4. For all of these reasons, appellant's second assignment of error is found not well-taken.

{¶ 22} In his third assignment of error, appellant claims 13 instances of abuse of discretion by the trial court. The first instance pertains to the trial court's denial of his motion for leave without conducting an evidentiary hearing. In our judgment, for the reasons discussed in appellant's first assignment of error, the trial court acted well within its discretion in determining that appellant's motion for leave did not warrant an evidentiary hearing. *Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893 at ¶ 23;

{¶ 23} The remaining twelve instances pertain to the trial court's various rulings during his 1994 trial. The first claims judicial bias and intimidation of appellant by a state witness during a suppression hearing; another involves the trial court's denial of appellant's request to fire his lawyer on the eve of his trial; and the remaining ten instances pertain to jury instructions. Because appellant has previously raised these arguments or could have raised them during his direct appeal, they are barred by res judicata. The trial court did not abuse its discretion when it denied appellant's motion

without a hearing because the application of res judicata to appellant's claims was clear. *State v. Russell*, 10th Dist. Franklin No. 04AP-1149, 2005-Ohio-4063, ¶ 7. Appellant's third assignment of error is not well-taken.

{¶ 24} Having found appellant's three assignments of error not well-taken, we affirm the judgment of the Lucas County Court of Common Pleas. 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, P.J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE