

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

State of Ohio

Court of Appeals No. L-15-1006

Appellee

Trial Court No. CR0200703684

v.

Stoney Thompson

**DECISION AND JUDGMENT**

Appellant

Decided: March 31, 2016

\* \* \* \* \*

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

Deborah Kovac Rump, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, denying appellant's, Stoney Thompson, motion for leave to file a delayed motion for a new trial. For the reasons that follow, we affirm.

## **Facts and Procedural Background**

{¶ 2} On June 10, 2008, after a one-week trial, a jury found appellant guilty of complicity in the aggravated murders of Kenneth Nicholson, Todd Archambeau, and Michael York. The trial court sentenced appellant to consecutive sentences of life without parole.

{¶ 3} Subsequently, appellant moved for a new trial, alleging that the prosecution committed *Brady* violations when it did not disclose two prior videotaped interviews with one of the state's witnesses, John Kuch. In those interviews, Kuch gave statements which contradicted his testimony at the trial. The videotapes came to light during the trial of appellant's brother for the same crimes. Notably, appellant's brother was acquitted of all charges.

{¶ 4} On July 31, 2009, the trial court denied appellant's motion for a new trial, finding that the evidence was not material, and that there was not a strong probability that the result of the proceedings would have been different if the evidence had been disclosed.

{¶ 5} We consolidated appellant's appeals from his conviction and from the denial of the motion for a new trial, and on September 30, 2011, we affirmed the judgments of the trial court in *State v. Thompson*, 6th Dist. Lucas Nos. L-08-1208, L-09-1214, 2011-

Ohio-5046. The Supreme Court of Ohio denied further review on February 22, 2012.

*State v. Thompson*, 131 Ohio St.3d 1457, 2012-Ohio-648, 961 N.E.2d 1136.<sup>1</sup>

{¶ 6} One year later, on March 11, 2013, appellant filed a petition in federal court for a writ of habeas corpus. Included with the filings was allegedly newly discovered evidence in the form of (1) an affidavit from Kenya Sharp, appellant's girlfriend at the time of the murders and a witness for the state, (2) an affidavit from Pam Smith, the aunt of Rosetta Perry, who was one of the state's witnesses, (3) unauthenticated records from the Lucas County Court of Common Pleas pertaining to criminal cases against Smith in 2007, and (4) a Toledo Police internal affairs file in which Detective Anderson, the lead detective on appellant's case, was found to have committed an "abuse of authority" in an unrelated matter.<sup>2</sup> On January 21, 2014, the federal court dismissed appellant's petition without prejudice so that, within 30 days, appellant could pursue his claims in state court.

{¶ 7} On March 28, 2014, appellant filed the present motion for leave to file a delayed motion for a new trial, incorporating the filings from the federal habeas petition. In opposition, the state moved to dismiss appellant's motion, arguing in part that appellant had not demonstrated that he was unavoidably prevented from discovering the new evidence in a timely manner.

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<sup>1</sup> Appellant's subsequent motion for reconsideration was denied by the Ohio Supreme Court on April 18, 2012. *State v. Thompson*, 131 Ohio St.3d 1513, 2012-Ohio-1710, 965 N.E.2d 312.

<sup>2</sup> Also included were affidavits from appellant's trial counsel and the trial counsel for his brother. Both of those affidavits pertained to the non-disclosure of the videotaped interviews of Kuch, which was litigated in his first motion for a new trial.

{¶ 8} On December 10, 2014, without a hearing, the trial court denied appellant's motion. In its decision, the court determined that appellant "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." In addition, the court found that appellant did not demonstrate that he "exercised reasonable diligence in discovering the grounds to support his motion, or that he could not have learned of the existence of those grounds within the time frame of Crim.R. 33." In its reasoning, the court first recognized that appellant did not provide an affidavit or other evidentiary material explaining any circumstances that had unavoidably delayed his discovery of the new evidence. The court then examined each piece of new evidence in search of reasons for the delay.

{¶ 9} First, the court noted that the affidavit of Kenya Sharp, which was executed on August 28, 2013, more than five years after appellant's conviction, did not indicate when she decided to recant her testimony, nor did it indicate when or how she caused her recantation to be made known to appellant. Appellant argued that Sharp's delayed statement was due to her fear of harassment by Detective Anderson. However, the court rejected this argument, finding that it was not based on evidentiary materials and that the affidavit did not assert a fear of Anderson beyond the time of the trial.

{¶ 10} Next, the court examined the affidavit of Pam Smith, and found that it also did not provide evidence of unavoidable delay. The "affidavit" consisted of one page, which stopped in mid-sentence, and which was neither dated nor signed. The court noted that despite the state pointing out these deficiencies in its motion to dismiss, appellant did

not address the deficiencies or provide the remaining pages. Like Sharp's affidavit, the court found that Smith's affidavit did not provide proof of unavoidable delay. Although Smith stated that she was incarcerated in Michigan shortly after the murders, and therefore would have been unavailable, the court documents pertaining to her criminal convictions that were also included with the motion for a new trial indicated that she was no longer being held by the time of the trial.

{¶ 11} Finally, the court considered the internal affairs file pertaining to Detective Anderson. Appellant argued in his motion that the file corroborated Sharp's and Smith's allegations that Anderson intimidated them into fabricating a story that corresponded with his theory of the murders. The trial court, however, found that the internal affairs investigation, based on an allegation made four years after appellant's conviction, was wholly unrelated to appellant's trial or conviction. Thus, the court concluded that the internal affairs file was immaterial to appellant's motion for a new trial.

{¶ 12} Appellant has timely appealed the trial court's December 10, 2014 decision, and now presents two assignments of error for our review:

Assignment of Error I: The trial court abused its discretion by not permitting Thompson to file his delayed motion for a new trial.

Alternatively, it abused its discretion by not at least having a hearing on the motion.

Assignment of Error II: Because the request for leave to file a delayed motion for a new trial involved allegations of *Brady v. Maryland*

violations, the trial court violated Thompson's right to due process of law by not permitting him to file it.

### **Analysis**

{¶ 13} Crim.R. 33(A)(6) provides,

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

\* \* \*

(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. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶ 14} Regarding the time when motions for a new trial may be filed, Crim.R. 33(B) states, in pertinent part,

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.

{¶ 15} Here, because more than 120 days had elapsed since the verdict was rendered, appellant moved for leave to file a delayed motion for a new trial. “Under the rule, the moving defendant must prove by ‘clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence’ on which the motion for a new trial is based.” *State v. Sandoval*, 6th Dist. Sandusky Nos. S-13-032, S-13-034, 2014-Ohio-4972, ¶ 13, quoting Crim.R. 33(B). “[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.” *Id.*, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). “A defendant is entitled to a hearing on his motion for leave if he submits ‘documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence at issue.’” *State v. Gray*, 8th Dist. Cuyahoga No. 94282, 2010-Ohio-5842, ¶ 20, quoting *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶ 19 (2d Dist.).

{¶ 16} We review the denial of leave to file a delayed motion for a new trial under an abuse of discretion standard. *State v. Willis*, 6th Dist. Lucas No. L-06-1244, 2007-Ohio-3959, ¶ 12. An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} In his first assignment of error, appellant argues that the trial court abused its discretion in denying his motion for leave to file a delayed motion for a new trial, or alternatively, that the court abused its discretion in denying that motion without a hearing. In support of his argument, appellant first contends that at least part of the delay in filing the motion for a new trial resulted from his timely progression through the state and federal courts. However, appellant does not explain the nearly one-year lull between when his application for reconsideration was denied by the Ohio Supreme Court and when he filed his habeas petition in federal court. Further, although appellant asserts that he filed the current motion within the 30 days provided by the federal court, the record indicates that it took appellant over 60 days to file his motion. As the trial court noted, the 30-day deadline is not binding on the state court; nevertheless, it does speak to the reasonableness of the delay in filing the motion. *See Willis* at ¶ 20, quoting *State v. Newell*, 8th Dist. Cuyahoga No. 84525, 2004-Ohio-6917, ¶ 16 (“[While] Crim.R. 33(B) itself does not provide a specific time limit for the filing of a motion for leave to file a delayed motion for new trial, subsequent case law has adopted a reasonableness standard.



\* \* \* ‘A trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.’”).

{¶ 18} Relying on *Gray*, 8th Dist. Cuyahoga No. 94282, 2010-Ohio-5842, at ¶ 21, appellant also argues that the rule requiring a showing of unavoidable delay should not be viewed “technically,” particularly where the information creates “a strong probability of a different result if a new trial were granted.” Although *Gray* can be read for that proposition, since the Eighth District found, without discussing whether *Gray* was unavoidably prevented from discovering the new evidence, that the trial court abused its discretion in denying *Gray*’s delayed motion for a new trial, the language cited by appellant refers only to the initial step of filing a motion for leave to file a delayed motion for a new trial. Here, appellant properly filed his motion for leave, thus the cited language is inapposite. Furthermore, Crim.R. 33(B) is clear that appellant must demonstrate “by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely.” Therefore, appellant’s reliance on *Gray* is misplaced.

{¶ 19} Appellant next cites *State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468, ¶ 19, for the proposition that because he had no control over when the recanting witnesses “did the right thing,” the trial court should have held a hearing to determine whether there was unavoidable delay in filing the motion for a new trial. However, in *Alexander*, the recanting witness filed an affidavit in which he stated that he decided to recant his testimony, and informed the defendant of his recantation,

after the 120-day period. Thus, the court held, “As such, an appellant would have no control over the time when the witness decided to ‘do the right thing,’ and thus could not have learned of the existence, even in the exercise of reasonable diligence, the affidavit ‘on its face’ would support unavoidable delay, and a hearing should be held to further develop the record and determine the issue.” *Id.*

{¶ 20} In this case, unlike *Alexander*, the affidavits submitted by appellant do not expressly state when the witnesses decided to recant their testimony. Moreover, aside from their date of execution—at least in the case of Sharp’s affidavit, since Smith’s affidavit was neither dated nor signed—the affidavits contain no illumination whatsoever regarding the timing of the recantations, or when appellant learned of the recantations, and appellant has not submitted his own affidavit explaining those circumstances. “[I]t has been squarely held that ‘the use of an affidavit signed outside of the time limit [under Crim.R. 33(B)] that fails to offer any reason why it could not have been obtained sooner is not adequate to show by clear and convincing proof that the evidence could not have been obtained within the prescribed time period.’” *State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893, ¶ 25, quoting *State v. Franklin*, 7th Dist. Mahoning No. 09 MA 96, 2010-Ohio-4317, ¶ 20; *Sandoval*, 6th Dist. Sandusky Nos. S-13-032, S-13-034, 2014-Ohio-4972, at ¶ 16. Thus, the affidavits on their face do not support unavoidable delay.

{¶ 21} Finally, appellant contends that because the trial court judge did not preside over all of the proceedings relevant to the first motion for a new trial, the court should

have held a hearing to weigh the credibility of the affiants. Alternatively, appellant argues that if the court was not satisfied with the amount of evidence relative to the newest allegations of *Brady* violations, the court should have held the motion in abeyance and granted appellant access to un-redacted police files. Appellant then details what he believes were deficiencies in the investigation, disclosure of evidence, and prosecution of his case that led to his conviction. All of these arguments go to the merits of his motion for a new trial. However, “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. Redd*, 6th Dist. Lucas No. L-13-1087, 2013-Ohio-5181, ¶ 9, quoting *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 14.

{¶ 22} Here, after examining the materials submitted with appellant’s motion for leave to file a delayed motion for a new trial, the trial court found that appellant had not demonstrated by clear and convincing proof that he was unavoidably prevented from discovering the evidence. We agree. As discussed above, appellant has not submitted his own affidavit supporting unavoidable delay. In addition, Sharp’s and Smith’s affidavits do not on their face provide any support for unavoidable delay. Finally, the internal affairs file pertaining to Detective Anderson at best only bolsters the credibility of the statements made in Sharp’s and Smith’s affidavits; it does not offer any basis to find that appellant was unavoidably prevented from discovering the evidence within the time constraints provided by Crim.R. 33(B). Therefore, we hold that the trial court did not

abuse its discretion when it denied, without a hearing, appellant's motion for leave to file a delayed motion for a new trial.

{¶ 23} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 24} In his second assignment of error, appellant argues that the trial court violated his due process rights by not allowing him to file his motion for a new trial, which included allegations of *Brady* violations. Appellant suggests that a motion for a new trial based on *Brady* violations does not need to comply with the time restraints of Crim.R. 33(B). We disagree.

{¶ 25} In support of his position, appellant quotes *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, 927 N.E.2d 1133, ¶ 35 (7th Dist.), wherein the Seventh District stated,

An appellate court reviewing a trial court's resolution of a motion for a new trial based upon *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, utilizes a due-process analysis rather than the abuse-of-discretion analysis used for motions for new trial made pursuant to Crim.R. 33. *State v. Johnston* (1988), 39 Ohio St.3d 48, 59, 529 N.E.2d 898. Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment. *Brady* at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 26} In *Brown*, however, the timeliness of the motion and whether the defendant was unavoidably prevented from discovering the alleged *Brady* violation were not at

issue. Rather, the Seventh District recognized that the motions must be timely filed, but because the trial court had reached the merits of the defendant's motion, the Seventh District assumed for purposes of its analysis that the motion was timely. *Brown* at ¶ 31.

{¶ 27} Similarly, in *Johnston*, which is relied upon by the court in *Brown*, the Ohio Supreme Court addressed the *Brady* violations in the context of a motion for a new trial pursuant to Crim.R. 33. The defendant in that case had pursued a new trial based upon prosecutorial misconduct under Crim.R. 33(A)(2)<sup>3</sup> and newly discovered evidence under Crim.R. 33(A)(6). The Supreme Court recognized that although the defendant's motion for a new trial was untimely, the trial court overlooked the timeliness issue and disposed of the motion on its merits, and in so doing implicitly found that the defendant was unavoidably prevented from filing the motion within the Crim.R. 33(B) time limits. Notably, it was in its discussion of the merits of the defendant's motion for a new trial that the Ohio Supreme Court stated that an appellate court should apply a due process analysis to the issue of prosecutorial misconduct. *Johnston* at 58-59.

{¶ 28} Here, in contrast to *Brown* and *Johnston*, the issue of timeliness was not overlooked by the trial court, and consequently the court did not reach the merits of appellant's motion for a new trial. Similar to the time requirements for a motion for a new trial based upon newly discovered evidence under Crim.R. 33(A)(6), a motion for a new trial based upon prosecutorial misconduct under Crim.R. 33(A)(2) must

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<sup>3</sup> "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: \* \* \* (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state." Crim.R. 33(A)(2).

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. Crim.R. 33(B).

{¶ 29} As discussed in his first assignment of error, appellant has provided no evidence which demonstrates that he was unavoidably prevented from filing his motion within the time constraints provided by Crim.R. 33(B).

{¶ 30} Accordingly, appellant's second assignment of error is not well-taken.

### **Conclusion**

{¶ 31} For the foregoing reasons, we find that substantial justice has been done the party complaining, and 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.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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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>.