[Cite as *State v. Williams*, 2015-Ohio-2687.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 JE 13
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
RASOOL HASSAN WILLIAMS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio
Case No. 10 CR 62

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Jane M. Hanlin
Prosecuting Attorney
Jefferson County Justice Center
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 29, 2015

[Cite as *State v. Williams*, 2015-Ohio-2687.]
WAITE, J.

{¶1} Appellant Rasool Hassan Williams appeals the denial of a motion for new trial he filed two and one half years after he was convicted and sentenced for shooting and killing Charles King in Steubenville. He claims to have discovered new evidence. His motion was denied without a hearing, and Appellant argues that he should have at least been given a hearing to determine whether he was unavoidably delayed in finding the new evidence that forms the basis of his motion. Appellant's entire argument for seeking a new trial is based on a photocopy of a vaguely worded affidavit that mentions a man who was seen running near North Eighth Street sometime in Steubenville in April of 2010. The murder occurred on April 20, 2010, at 234 North Eighth Street. At trial, Appellant attempted to connect this person with the crime, to no avail. The affidavit, only a few lines long, contains no specific details about either the affiant or the crime. The trial court was within its discretion in overruling the motion without a hearing, and the judgment of the trial court is affirmed.

Case History

{¶2} Appellant was indicted in Jefferson County on May 26, 2010, for the murder of Charles King. The murder occurred on April 20, 2010, at 234 North Eighth Street in Steubenville, at Appellant's temporary residence at the time. Witnesses saw Appellant murder King in front of the house. The murder was apparently related to a dispute over Appellant's interactions with King's girlfriend. Appellant shot the victim, returned to his house, came back out to the victim, taunted him and then shot him again. King died shortly afterward. Appellant fled to New Rochelle, New York,

but was captured there 28 days later. The murder weapon was not recovered, but the bullets used in the crime were .380 caliber full metal jacket rounds, and a box of these rounds with Appellant's fingerprints on it was found at Appellant's home. The case went to jury trial. A number of eyewitnesses testified as to Appellant's involvement with the crime. Appellant testified in his defense. As part of his defense, he speculated that a friend of his named Lloyd was present at the scene of the crime and may have fired additional shots at King. There was no other evidence that someone named Lloyd was at the scene of the crime or that another gun was used in the crime, and Appellant fully admitted he fired shots at King. *State v. Williams*, 7th Dist. No. 11 JE 7, 2012-Ohio-5256, ¶7. On March 18, 2011, he was convicted of murder, with a gun specification, and of having a weapon while under a disability. The court sentenced him to life in prison with the possibility of parole after 20 years. He filed a direct appeal, and the conviction and sentence were affirmed.

{¶3} On November 19, 2013, Appellant filed a *pro se* motion for new trial and a separate motion for leave to file a motion for new trial. Attached to the motion for new trial was a photocopy of an affidavit purportedly from Eric Montgomery, Sr. The affidavit states that Montgomery saw Lloyd Williams, sometime in April 2010, running from a crime scene on North Eighth Street in Steubenville. It states that Lloyd went into a house on North 9th Street holding what looked like a gun or black object, then exited the house and ran back toward North Eighth Street. Lloyd later told Montgomery that his best friend was shot that morning. Lloyd also told him that he

disposed of his gun. The court overruled Appellant's motions on March 14, 2014. This timely appeal followed.

ASSIGNMENT OF ERROR

> THE COURT ABUSED ITS DISCRETION BY OVERRULING THE DEFENDANT'S MOTIONS FOR LEAVE TO FILE AND FOR A NEW TRIAL WITHOUT A HEARING

{¶4} Appellant argues that he is entitled to a hearing on whether he was unavoidably prevented from filing his motion for new trial within the 120-day time limit set by Crim.R. 33(B). Appellant believes he has substantial new evidence in the form of an affidavit from Eric Montgomery, Sr. Appellant acknowledges that a trial court's decision overruling a Crim.R. 33 motion for new trial is reviewed for abuse of discretion. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993).

{¶5} Even if we assume that Montgomery's affidavit contained true and relevant information to this case, the actual content of the affidavit could not form the basis of a new trial. Therefore, there was no reason for the trial court to hold a hearing on the issue of whether Appellant was unavoidably prevented from filing his motion on time. For the following reasons, the assignment of error is overruled.

{¶6} 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.

{¶7} It is within the discretion of the trial court to decide whether a hearing should be held on a Crim.R. 33 motion. *State v. Rodriguez-Baron*, 12-MA-44, 2012-Ohio-5360, ¶7. If a motion for new trial alleging discovery of new evidence is filed beyond the 120-day time limit in Crim.R. 33(B), the defendant must request leave to file the motion in order to establish, by clear and convincing evidence, that there was unavoidable delay in filing the motion. *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶25 (7th Dist.). Unavoidable delay results when the party had no knowledge of the existence of the grounds in support of the motion for a new trial and could not have learned of the existence of those grounds within the required time, exercising reasonable diligence. *Id.*

{¶8} The Ohio Supreme Court has established a six-part test for determining whether a motion seeking a new trial on the grounds of new evidence should be granted: "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (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. Lopa*, 96 Ohio St. 410, 117 N.E. 319, approved and followed.)" *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶9} If there is no basis for granting a hearing on whether the motion for new trial based on newly discovered evidence has merit, there is no reason to hold a hearing to determine whether there was unavoidable delay in filing the motion. *State v. Mir*, 7th Dist. No. 12 MA 210, 2013-Ohio-2880. At most, the failure to hold a hearing on the issue of unavoidable delay is harmless error. In this case, the supposedly new evidence consists of an affidavit from a Mr. Montgomery, a man apparently without an address or phone number. The original affidavit is not in the record. The affidavit contains nothing specifically related to Appellant's crime. It does not mention any specific day, only vaguely refers to North Eighth Street, does not mention the name of Lloyd Williams' friend who was supposedly shot, and does not even state that Lloyd Williams had a gun, but only that he might be carrying a black object or something that looked like a gun. It is so devoid of details that it could barely be treated as relevant evidence.

{¶10} At best, this affidavit could only serve as rebuttal evidence to the overwhelming amount of evidence that contradicted Appellant's defense testimony, and such rebuttal evidence cannot form the basis for a new trial. "[N]ew evidence that merely contradicts prior evidence does not provide a basis for granting a new trial." *Mir* at ¶12. As we stated in the direct appeal:

> [Appellant's] version of the events is not corroborated by any other witness. * * *
>
> On cross-examination, the prosecutor established that Appellant's testimony was inconsistent with all the other evidence in the case, including the evidence of the other eyewitnesses. The prosecutor tried to get Appellant to explain why the shell casings were found far away from where Appellant stated he fired the gun, and he responded by speculating that the casings had been moved. (Tr., p. 845.) Appellant also had no explanation why there were no other casings, bullets, or other evidence found to support his theory that another gun was fired by the victim's friend, Lloyd.

Williams at ¶16-17.

{¶11} Montgomery's affidavit could simply be used to slightly bolster Appellant's testimony at trial, testimony that completely contradicted all the other evidence. Since the affidavit contains nothing more than weak rebuttal evidence to the state's case, there is no basis for granting a new trial and no reason to allow an evidentiary hearing or consider the issue of unavoidable delay. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.