

[Cite as *State v. Croom*, 2016-Ohio-5686.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 14 MA 0175
VS.	)	
	)	OPINION
STANLEY CROOM	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Mahoning County,  
Ohio  
Case No. 10 CR 35

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee Attorney Paul Gains  
Mahoning County Prosecutor  
Attorney Ralph Rivera  
Assistant Prosecutor  
21 West Boardman Street, 6th Floor  
Youngstown, Ohio 44503-1426

For Defendant-Appellant Attorney Fred Middleton  
1717 The Superior Building  
815 Superior Avenue East  
Cleveland, Ohio 44114-2702

JUDGES:

Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: August 29, 2016

[Cite as *State v. Croom*, 2016-Ohio-5686.]  
DeGENARO, J.

{¶1} Defendant-Appellant, Stanley Croom, appeals the trial court's decision denying, without a hearing, his successive postconviction motion based upon purported newly discovered evidence. Because Croom and prior counsel were aware of the video evidence at the time of trial, it is not newly discovered; thus, the judgment of the trial court is affirmed.

### **Facts and Procedural History**

{¶2} The facts of this case are set forth in the direct appeal of Croom's conviction and sentence. *State v. Croom*, 7th Dist. No. 12 MA 54, 2013–Ohio–5682 (*Croom I*). Croom and co-defendant Jeffrey Shorter were indicted by the Mahoning County Grand Jury in connection with a robbery at a Belleria pizza shop in Youngstown. The indictment also contained counts of attempted aggravated murder and retaliation in connection with Croom's efforts to murder a key witness in the robbery case, as well as firearm and having a weapon under disability specifications. Croom had several court-appointed attorneys prior to trial, but ultimately waived his right to counsel and chose to represent himself at trial. He was tried together with Shorter. Croom was convicted on all counts and the trial court sentenced him to an aggregate sentence of 30 years in prison, after merging the retaliation and attempted aggravated murder counts. On direct appeal we reversed the conviction for having a weapon under a disability but affirmed all the remaining convictions and sentences. *Croom I* at ¶ 175.

{¶3} Croom has instituted multiple proceedings with this and the trial court since. First, he filed pro se his first postconviction petition, which was denied by the trial court and affirmed by this court on appeal. *State v. Croom*, 7th Dist. No. 13 MA 98, 2014-Ohio-5635. (*Croom II*.) Next, Croom sought reconsideration and reopening of his direct appeal, which we dismissed as untimely and without merit respectively. *State v. Croom*, 7th Dist. No. 12 MA 54, 2014-Ohio-1945 (*Croom III*.)

{¶4} In this appeal, Croom challenges the trial court denying his second postconviction petition/new trial motion based upon alleged newly discovered evidence, specifically surveillance video from the robbery of a Walgreens store, a

crime for which his co-defendant in the present case, Shorter, had pled guilty. He claimed the prosecution failed to divulge this exculpatory evidence during discovery and trial of the present case, thus violating his constitutional rights.

{¶15} As exhibits, Croom attached several affidavits, first, from his current counsel, Fred Middleton, stating he had received the video discs of the Walgreens robbery from the prosecutor's office on March 3, 2014. A February 27, 2014 letter from Assistant Prosecutor Ralph Rivera, responding to Middleton's request for the DVDs, was attached as an exhibit. Second, Croom's affidavit was attached, stating that the prosecutor's office failed to produce the Walgreens robbery video during discovery and that he only learned of the video's existence two years after he was sentenced to prison. He said he retained Middleton as counsel in 2014, who was provided a copy of the video by the prosecutor. Third, Croom attached an affidavit of Antoine Arnold, a security technician trained in electronic, video and digital media and communications, who used the DVDs of the Walgreens and Belleria robberies to extract and print two still photographs, attached as Exhibits B and D. The DVDs of the two robberies along with digital copies of the photographs, were also attached as Exhibits A and C.

{¶16} The State filed a response opposing the motion, attaching, inter alia, the affidavit of Assistant Prosecutor Rebecca Doherty, who averred that she had multiple discussions with Croom's prior trial counsel concerning the Walgreens video. Doherty stated that Attorney Timothy Franken was initially appointed to represent Croom and on May 20, 2010, Franken filed a Motion for Exculpatory Evidence, in which he requested "all police reports, witness statements, pictures, and video tapes of any other aggravated robberies of which co-Defendant Jeffrey Shorter is a suspect." Doherty further averred that she personally spoke to counsel for both Croom and Shorter concerning the Walgreens robbery, and reviewed the photographs and videos taken at the Walgreens with both counsel.

{¶17} On November 17, 2014, the trial court denied Croom's motion:

The Court has reviewed both the motion and response and

makes the following findings. The Court finds that the Defendant, Stanley Croom, failed to justify that he was unavoidable [sic] prevented from discovering the alleged newly discovered evidence, furthermore, the Court finds the Defendant failed to file his motion within a reasonable time upon discovering said evidence. In addition, the Court finds the Defendant's motion meritless because prior trial counsel was aware of the Walgreens video, thus making the evidence not newly discovered. The Court hereby finds the Defendant's motion untimely and meritless [and] is hereby overruled.

#### **Motion for New Trial/Postconviction Petition**

{¶18} Croom asserts two assignments of error on appeal, which will be discussed together:

The Trial Court erred by failing to hold an evidentiary hearing on the [postconviction] motion for new trial based on newly discovered evidence.

The Trial Court erred by failing to consider Appellant's and his attorney's affidavits and the docket, which support the claim the evidence was newly discovered and that a reasonable delay occurred in the processing of the evidence for the [postconviction] petition.

{¶19} To succeed on a new trial motion in a criminal case on the basis of newly discovered evidence under Crim.R. 33(A)(6), the defendant must show that the new evidence: "(1) raises a strong probability that the result of the case will change if a new trial is granted, (2) has been discovered since the trial, (3) could not have been discovered prior to trial through the exercise of due diligence, (4) is material to the issues, (5) is not cumulative to other known evidence, and (6) does not merely impeach or contradict the other known evidence." *State v. Dew*, 7th Dist. No. 13 MA 174, 2016-Ohio-274, ¶ 9, citing *State v. Barber*, 3 Ohio App.3d 445, 447, 445 N.E.2d

1146 (10th Dist.1982), citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947). However, the rule does not require a hearing to resolve the motion. *State v. Billman*, 7th Dist. No. 12 MO 3, 2013-Ohio-5774, ¶ 43.

{¶110} The decision to grant or deny a new trial based upon "grounds of newly discovered evidence falls within the sound discretion of the trial court." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350 (1993). Similarly, whether the motion warrants a hearing is within the trial court's discretion. *State v. Mir*, 7th Dist. No. 12 MA 210, 2013-Ohio-2880, ¶ 7. An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal. See *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶ 21.

{¶111} A motion for new trial based on newly discovered evidence must also be timely filed: 120 days after the verdict. Crim.R. 33(B). If the motion is filed beyond that time frame, the defendant must demonstrate he was unavoidably prevented from doing so. *Id.* Thus, in order to pursue a delayed motion for new trial, a defendant "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. Brown*, 186 Ohio App.3d 309, 319, 2010-Ohio-405, 927 N.E.2d 1133, ¶ 23 (7th Dist.), quoting *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 16 (2d Dist.).

{¶112} " '[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.' " *Brown* at ¶ 23, quoting *Parker* at ¶ 16. Many courts have additionally required that motions for leave to file a delayed new trial motion must be made within a reasonable time after discovering the evidence. *Brown* at ¶ 23 (collecting cases).

{¶113} Here, Croom claims that he should be entitled to a new trial because of

alleged newly discovered evidence, to wit, a store surveillance video of a Walgreens robbery—a crime to which Croom's co-defendant herein, Shorter, pled guilty. The Walgreens video shows the robber as a black man wearing a dark-colored parka with fur around the hood. The video of the Belleria Pizza robbery, played during the trial in the present case, also shows the robber as a black man wearing a very similar parka.

{¶14} Croom filed his motion outside the time-frame set forth in Crim.R. 33(B). The jury verdict in this case was entered in February 2012 and the new trial motion was filed on October 29, 2014, well outside the 120 days. Thus, Croom was required to show that 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 prescribed for filing the motion for new trial in the exercise of reasonable diligence; and that the motion was made within a reasonable time after discovering the evidence. *See Brown, supra*.

{¶15} With regard to the first issue, Croom presented his own affidavit, stating that the prosecutor's office failed to produce the Walgreens robbery video during discovery and that he only learned of the video's existence two years after he was sentenced to prison. However, this assertion stands in opposition to statements Croom himself made at sentencing in this case. As explained in the direct appeal opinion, during sentencing Shorter's counsel mentioned the Walgreens robbery, and Shorter explained that the case remained pending. *See Croom I*, 2013-Ohio-5682, ¶ 145. Croom then claimed that the prosecutor knew he was not guilty "because she indicted someone else for the Walgreens robbery based upon the same photographs used in this case." *Id.* Thus, Croom mentioned the existence of the video and corresponding photographs that he claims here he had no knowledge of prior to trial for the Belleria robbery. *See id.*

{¶16} Further, Croom had a series of court appointed attorneys during the pretrial proceedings (Tim Franken, Michael Gollings, and Anthony Meranto) before waiving his right to counsel and proceeding pro se at trial with standby counsel. Croom failed to present affidavits of any of his trial attorneys in support of his motion.

{¶17} Conversely, the State presented the affidavit of assistant prosecutor Doherty, who averred that she had multiple discussions with Croom's prior trial counsel concerning the Walgreens video; that she personally spoke to counsel for both Croom and Shorter concerning the Walgreens robbery; and reviewed the photographs and videos taken at Walgreens with both counsel.

{¶18} Doherty also stated that Franken was initially appointed to represent Croom and on May 20, 2010, Franken filed a Motion for Exculpatory Evidence, in which he requested "all police reports, witness statements, pictures, and video tapes of any other aggravated robberies of which co-Defendant Jeffrey Shorter is a suspect." Indeed, the record in this case reveals such a filing. Although this motion does not specifically reference the Walgreens robbery, it seems to be strong corroborating evidence of Doherty's assertions in her affidavit.

{¶19} The trial court properly concluded that Croom failed to establish the Walgreens video was newly discovered evidence, because his prior counsel was aware of the robbery and had reviewed the photographs and videos taken.

{¶20} The State also asserts Croom failed to make the motion within a reasonable time. Counsel did not file the motion until seven or eight months after receiving the DVD, asserting the delay was reasonable because it took that length of time for the defense to find qualified videographers and funds to have the surveillance video prepared to present along with the motion. Even assuming *arguendo* this constitutes a reasonable delay, this argument is moot in light of Croom's failure to demonstrate the video was newly discovered evidence. Accordingly, the trial court properly denied Croom's motion.

{¶21} Croom's motion also fails as a postconviction petition. A defendant convicted of a criminal offense who alleges the denial of a constitutional right at trial may seek postconviction relief pursuant to R.C. 2953.21(A)(1)(a). This type of petition is a civil proceeding attacking the validity of the criminal judgment. *State v. Milanovich*, 42 Ohio St.2d 46, 49, 325 N.E.2d 540 (1975). A trial court will review the petition and any supporting documents, along with the record of proceedings, to

determine if there are substantive grounds for relief before dismissing a petition. R.C. 2953.21(C).

{¶22} The mere filing of a petition for postconviction relief does not automatically guarantee that the petitioner will receive a hearing on the matter. "Before a hearing is granted, the petitioner bears the initial burden in a post-conviction proceeding to submit evidentiary documents containing sufficient operative facts to demonstrate" that he is entitled to relief. *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980). "[T]he court shall determine whether there are substantive grounds for relief" before a hearing may be granted. R.C. 2953.21(C). The court must first determine whether there is reason to believe that, "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States [.]" R.C. 2953.21(A)(1)(a); *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982).

{¶23} More fundamentally, we must address the trial court's jurisdiction to entertain the motion as it is both untimely and successive.

{¶24} The requirement that a petition for postconviction relief be filed timely is jurisdictional. R.C. 2953.23(A) ("a court may not entertain a petition filed after the expiration of the period prescribed [in R.C. 2953.21]"). Unless the petition is filed timely, the court is not permitted to consider the substantive merits of the petition. *State v. Beaver*, 131 Ohio App.3d 458, 461, 722 N.E.2d 1046 (11th Dist.1998) (the trial court should have summarily dismissed appellant's untimely petition without addressing the merits). If the petition is untimely or a second/successive petition, R.C. 2953.23(A) precludes the trial court from entertaining the petition unless the petitioner shows he was unavoidably prevented from discovering the facts upon which relief is based, or that after the time expired, the United States Supreme Court recognized a new federal or state right that applies retroactively and is the basis for relief. R.C. 2953.23(A)(1)(a). The petitioner must then show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found [him] guilty of the offense of which [he] was convicted." R.C.

2953.23(A)(1)(b).

**{¶25}** This is a successive motion—we reviewed the denial of his first petition in *Croom II*, 2014-Ohio-5635, *supra*, in which Croom raised the video. We stated:

Finally, we must comment on Appellant's reference to possible security video evidence that he somehow now believes constitutes a basis for requiring an evidentiary hearing on his petition. Appellant refers to security camera video both of the robbery of Belleria Pizza and video from a separate robbery of a Walgreens Drug Store. The security video of the robbery was available to Appellant prior to and during his trial, and he referred to the content of the video in his direct appeal, particularly with respect to his manifest weight of the evidence argument. *Croom I* at ¶ 75–80. Whether or not there is additional video of Appellant or someone else committing a second crime at Walgreens cannot alter the evidence presented against him in this case. Appellant is basically challenging the weight of the evidence identifying him as the person who attempted to rob Belleria Pizza. MyLinda Seamans, a Belleria employee, identified Appellant. She identified him in a photo lineup and in the courtroom. She identified the gloves he was wearing when he committed the crime. He was identified by his coat, by his vehicle, by his height and weight, and by the fact that he had no facial hair. The gloves were recovered from his vehicle when Appellant was arrested and had his DNA on them. As Appellant is well aware, he was also recorded on Belleria's security camera video. Appellant is essentially raising a different manifest weight of the evidence argument here than the one he raised on direct appeal, an argument based in part on a video he did not produce in support of his petition and that he cannot show or even describe as being relevant to any constitutional violation. There is nothing in Appellant's discussion of these videos that could possibly require the trial court to hold a hearing on his petition.

Therefore, no error has been established. For all of these reasons, we overrule Appellant's assignment of error.

*Croom II* at ¶ 12.

{¶26} Croom cannot show that he was unavoidably prevented from discovering the facts upon which his claim for relief was based. He was aware of the video *at least* at the time of his first petition and likely prior to trial. As a postconviction petition, Croom's motion fails as it was untimely, successive, and does not fall under one of the exceptions; the trial court lacked jurisdiction to consider it.

{¶27} In sum, both of Croom's assignments of error are meritless. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs.

Waite, J., concurs.