

[Cite as *State v. Sawyer*, 2005-Ohio-6486.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85911

STATE OF OHIO,

Plaintiff-Appellee

v.

EUGENE SAWYER,

Defendant-Appellant

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JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

DECEMBER 8, 2005

CHARACTER OF PROCEEDING:

Criminal Appeal from
Common Pleas Court,
Case No. CR-415422.

JUDGMENT:

AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant Eugene Sawyer appeals from the trial court's denial of his "motion for court order finding that he was unavoidably prevented from discovery of evidence." For the reasons that follow, we affirm.

{¶ 2} Appellant was indicted in 2001 by the Cuyahoga County Grand Jury on charges of sexual battery, unlawful sexual conduct with a minor, corrupting another with drugs and child endangerment. The charges stemmed from allegations made by appellant's fourteen-year-old daughter, and related to events that allegedly occurred from February 2001 through July 2001.

{¶ 3} Prior to trial, which occurred in February 2002, the State dismissed the sexual battery charge. The jury acquitted appellant of unlawful sexual conduct with a minor, but convicted him of corrupting another with drugs, a second-degree felony, and child endangerment resulting in serious physical harm to the victim, a third-degree felony. Appellant was sentenced to a seven-year term for corrupting another with drugs and a four-year term for child endangerment. The sentences were ordered to be served concurrently.

{¶ 4} On appeal, this court found that the State did not present sufficient evidence to support a conviction on the elevated charge of felony child endangering with respect to the element of serious physical harm. *State v. Sawyer*, Cuyahoga App. No. 8113, 2003-Ohio-1720. Thus, we remanded the case for the trial court to

modify the conviction to reflect child endangering as a first-degree misdemeanor and to resentence appellant accordingly.

{¶ 5} On November 15, 2002, appellant filed a postconviction petition with the trial court, which denied it on March 4, 2003. Appellant appealed that denial, but the appeal was dismissed for lack of final appealable order, because there were no findings of fact and conclusions of law. Thereafter, on December 17, 2003, the trial court issued findings of fact and conclusions of law. Appellant attempted to appeal from those findings and conclusions, but the appeal was dismissed by this court for failure to file a praecipe.

{¶ 6} On November 15, 2002, appellant also filed a "motion for court order finding that he was unavoidably prevented from discovery of evidence." In that motion, appellant essentially sought a finding that he was unavoidably prevented from timely filing a motion for a new trial based upon newly discovered evidence. The "newly discovered evidence" was appellant's daughter's recantation of the allegations of criminal activity she had made against appellant. Specifically, she averred in an affidavit that her testimony at trial that she had smoked crack cocaine with appellant was a lie, and that she had lied because she was upset with appellant for being too strict with her. The trial court denied the motion and appellant appealed to this court. *State v. Sawyer*, Cuyahoga App. No. 84487, 2004-Ohio-6911. This court affirmed the denial of appellant's motion. *Id.*

{¶ 7} On January 11, 2005, appellant filed another "motion for court order finding that he was unavoidably prevented from discovery of evidence." Included with the motion were the victim's affidavit previously filed with the court in support of appellant's first motion and the victim's 2001 probation records. The probation records indicated that the "2-27-01 urine screen was done and the results were negative"; "[the victim] has had negative urine screens" (for the report period dated March 13, 2001 through May 15, 2001); "[the victim's] urine screens were all negative" (for the report period May 15, 2001 through May 30, 2001). The period of offense, as alleged in the indictment, was from February 2001 through July 2001. The supplementary police report indicated that, according to the victim, she started smoking crack with appellant in March 2001, and smoked it with him at least ten times.

{¶ 8} Appellant further alleged in the motion that he sought to obtain the results of his own urine tests from the Cuyahoga County Children Services, but as of the time he filed the motion his requests were unanswered. The trial court denied appellant's motion and appellant now appeals.

{¶ 9} The decision to grant or deny a motion for a new trial is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed. *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350, 612 N.E.2d 1227, citing *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

{¶ 10} Crim.R. 33 sets forth grounds upon which a new trial may be granted. One of the grounds is "when new evidence material to

the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6). A motion based upon newly discovered evidence must be filed within 120 days after the verdict. Crim.R. 33(B).

{¶ 11} If a defendant files a motion for a new trial after expiration of the time period specified in Crim.R. 33(B), the defendant must first seek leave of the trial court to file a delayed motion. *State v. Mathis* (1999), 134 Ohio App.3d 77, 79, 730 N.E.2d 410. To obtain leave, the defendant must demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence within the time period provided by Crim.R. 33(B). *Id.* A party is "unavoidably prevented" from filing a motion for a new trial if he has no knowledge of the existence of the evidence or grounds supporting the motion for a new trial, and could not have learned of the matters concerned within the time provided by Crim.R. 33(B), in the exercise of reasonable diligence. *Id.*

{¶ 12} The record demonstrates that appellant failed to file a motion for a new trial within fourteen days following the verdict against him. Thus, appellant needed to show, by clear and convincing proof, that he was "unavoidably prevented" from filing his motion for new trial or discovering the new evidence upon which he must rely. In his first motion, appellant claimed that he was unavoidably prevented from discovering the victim's affidavit. In particular, appellant's counsel averred in an affidavit that while working on appellant's postconviction petition, she contacted the

victim's mother to obtain some information and at that time learned that the victim admitted that her trial testimony was a lie.

{¶ 13} In his second motion, which is the subject of this appeal, appellant claimed that he was unavoidably prevented from discovering evidence that corroborated the victim's affidavit. Specifically, appellant claimed that he attempted to obtain the victim's urine test results on his own, but was unable to do so until the victim's mother signed a release allowing him access to the results. Further, appellant claimed that at the time he filed the motion, he had not been able to obtain the results of his own urine tests from Cuyahoga County Children Services, despite his requests for same.

{¶ 14} As already mentioned, this court found in considering appellant's first motion that he failed to demonstrate, by clear and convincing evidence, that he was unavoidably prevented from discovering the victim's affidavit and, thus, that the trial court did not abuse its discretion in denying the motion. *Sawyer*, 2004-Ohio-6911, *supra*.

{¶ 15} While the abuse of discretion standard applies to a motion for a new trial based upon newly discovered evidence, in cases where the newly discovered evidence is claimed to have been suppressed, the reviewing court is to invoke a due process analysis as the defendant's Fourteenth Amendment right to a fair trial is at issue. *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194; *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898. When the prosecution withholds material, exculpatory evidence in a

criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial. *Brady* at 83.

{¶ 16} The suppression by the prosecution of evidence favorable to an accused upon request "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* at 87. Thus, the touchstone issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material. In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375. See, also, *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 57, 107 S.Ct. 989. The Supreme Court held that this standard of materiality applies regardless of whether the evidence was specifically, generally or not at all requested by the defense. *Bagley*, *supra*, at 682.

{¶ 17} In the case at bar, however, the issue has not been framed in such a manner that we are able to engage in a due process analysis under *Brady*, because we are not reviewing the denial of a motion to suppress. Thus, upon review, utilizing the required abuse of discretion analysis for a motion made pursuant to Crim.R

33, we again find that the trial court did not abuse its discretion in denying appellant's motion.

{¶ 18} Accordingly, we find appellant's sole assignment of error without merit and affirm the decision of the trial court.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE
JUDGE

DIANE KARPINSKI, P.J., and

KENNETH A. ROCCO, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with

supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).