

[Cite as *State v. Bialec*, 2006-Ohio-1585.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86564

STATE OF OHIO

Plaintiff-Appellant

VS.

EDWARD BIALEC

Defendant-Appellee

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JOURNAL ENTRY

and

## OPINION

DATE OF ANNOUNCEMENT  
OF DECISION:

March 30, 2006

CHARACTER OF PROCEEDING:

Criminal appeal from  
Common Pleas Court  
Case No. CR-455002

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

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APPEARANCES :

For Plaintiff-Appellant:

WILLIAM D. MASON  
Cuyahoga County Prosecutor  
JON W. OEBKER, Assistant  
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For Defendant-Appellee:

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ANTHONY O. CALABRESE, JR., P.J.:

{¶1} The state of Ohio appeals the trial court's granting defendant Edward Bialec's motion for a new trial, based on the motion being untimely filed. After reviewing the facts of the case and pertinent law, we affirm.

I.

{¶2} On March 2, 2005, after a bench trial, the court journalized an entry finding the defendant guilty of aggravated robbery in violation of R.C. 2911.01, with firearm specifications in violation of R.C. 2941.141 and 2941.145. On March 22, 2005, 20 days after the court's decision, the defendant filed a motion for a new trial pursuant to Crim.R. 33(A)(4). On May 18, 2005, the court held a hearing on the defendant's motion and found that his conviction was not supported by sufficient evidence, but he was guilty of the lesser included offense of theft in violation of R.C. 2913.02.

II.

{¶3} In its sole assignment of error, the state argues that "the trial court erred in granting defendant's motion for new trial which did not present new evidence and was filed outside the time requirements of Crim.R. 33."

{¶4} The defendant filed a motion for a new trial based on Crim.R. 33(A)(4), which states as follows:

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

**\*\*\*\*\***

**"(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or**

**of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified.”**

{¶5} Additionally, Crim.R. 33(B) governs the time frame for filing motions for a new trial, and the pertinent part reads:

**“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, or the decision of the court where a trial by jury has been waived, 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.”**

{¶6} The decision to grant or deny a motion for a new trial is within the competence and discretion of the trial court. We will not reverse the court’s decision regarding a motion for a new trial absent an abuse of that discretion. *State v. Hill* (1992), 64 Ohio St.3d 313.

{¶7} The state argues that the defendant filed his motion outside the 14-day mandatory time period; thus, the trial court lacked jurisdiction to grant the motion. The defendant, in turn, argues that the court found by clear and convincing evidence that he was unavoidably prevented from filing the motion within the 14 days because he was involved in potential presentence plea negotiations with the state and two co-defendants, and his counsel believed that filing the motion would prejudice the ongoing negotiations. The state alleges that the defendant’s argument fails for two reasons. First, the “unavoidably prevented” language in Crim.R. 33 only applies to motions for a new trial based on newly discovered evidence. Second, the reason for the defendant’s untimely

filing, i.e., plea negotiations, cannot serve as a ground for failure to comply with the statutory time frame.

{¶8} The state is incorrect in its assertion that only newly discovered evidence may unavoidably prevent a defendant from timely filing a motion for a new trial. The meaning of Crim.R. 33(B) is clear and unambiguous. Motions for a new trial based on insufficient evidence must be filed within 14 days, unless “the defendant was unavoidably prevented from filing his motion for a new trial.” (Emphasis added.) See, also, *State v. Daws*, Montgomery App. No. 18686, 2001-Ohio-1549. The state is also incorrect in its second assertion that to succeed in filing a late motion for a new trial, a defendant must allege newly discovered evidence. The state cites *State v. McMahan*, Cuyahoga App. No. 82753, 2004-Ohio-229, as support for its argument. *McMahan* involved a motion for a new trial based on Crim.R. 33(A)(6), which states that newly discovered evidence may be used as grounds for a new trial. In the case of newly discovered evidence, 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).”

{¶9} However, there are other permissible grounds for granting a new trial. The instant case is based on a motion for a new trial filed under Crim.R. 33(A)(4), which deals with insufficient evidence to support a conviction. Therefore, *McMahan* is not applicable to the case at hand and the state cites no other law to support its argument. Accordingly, we cannot say that the court abused its discretion by granting the defendant’s motion, and the state’s assignment of error is without merit.

Judgment affirmed.

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a. ANTHONY O. CALABRESE, JR.  
i. PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., CONCURS IN  
JUDGMENT ONLY;  
MICHAEL J. CORRIGAN, J., CONCURS IN JUDGMENT  
ONLY WITH SEPARATE CONCURRING OPINION.

MICHAEL J. CORRIGAN, J., CONCURRING IN JUDGMENT ONLY:

{¶10} This appeal is before us solely on the jurisdictional question whether the court properly granted leave to file a delayed motion for a new trial under Crim.R. 33(B) because defendant Edward Bialec had been unavoidably prevented from filing that motion within the stated time period. The *finding* of unavoidable delay is a jurisdictional prerequisite for a grant of leave under the rule. The *facts* supporting the court's finding are not.

{¶11} Bialec conceded that he did not file the motion within 14 days as required by Crim.R. 33(B), but claimed that he had been unavoidably prevented from doing so by virtue of ongoing bargaining relating to his sentence. The state told the court it "has no objection for - to listening to this motion on its merit, your Honor, as it pertains to the timing of the motion."

{¶12} This is a classic case of invited error. Having told the court it had no objection to the motion for a new trial being heard on its merits, the state cannot complain of error which

it induced. See *State v. Smith*, 148 Ohio App.3d 274, 2002-Ohio-3114.

{¶13} None of this is to suggest that I agree in principle with the court's decision to grant a new trial. Bialec did not offer anything new to the court in his motion for a new trial. He simply relied upon evidence previously heard at trial. Indeed, it was the failed sentence negotiations that became the impetus for the motion for a new trial. The outcome of sentence negotiations did not, and could not, affect the outcome of trial because they are clearly outside the evidence which could have been admissible as a defense to the charged offenses. Nevertheless, we review a trial court's determination of a Crim.R. 33 motion under an abuse of discretion standard. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. With the state having conceded the issue of unavoidable prevention for purposes of a leave determination under Crim.R. 33(B), I cannot find that the court abused its discretion by granting leave based on that concession. My disagreement with a court's ruling is not a basis for finding an abuse of discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶14} Likewise, I question the court's action in not only granting Bialec's motion for a new trial when it contained no "new" evidence, but then finding him guilty of a lesser included offense.

Bialec did not offer any new evidence, but simply asked the court to look at the trial testimony from a different perspective.

{¶15} The abrupt manner of the court's action leaves the singular impression that it reconsidered its verdict in order to give Bialec the benefit of the failed negotiations occurring after the judgment of conviction. Presumably, the court took it upon itself to sentence Bialec under the lesser offense and more closely approximate the sentence that Bialec and the state agreed to prior to plea negotiations collapsing. This is the only conclusion permitted by the record given the court's failure to cite to any law or otherwise justify the reversal of its prior judgment. Unilateral judicial plea bargaining has no place in our criminal justice system.

{¶16} Unfortunately, the state did not appeal this aspect of the case. Instead, it limited its appeal solely to reviewing the jurisdictional basis for finding unavoidable prevention under Crim.R. 33(B). I reluctantly believe that decision fell within the court's broad discretion. I very strongly believe, however, that nothing contained in the lead opinion can or should be construed as condoning the court's groundless decision to reconsider its verdict in order to implement a plea bargain of its own choosing.