[Cite as *State v. Gray*, 2010-Ohio-11.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92646

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICARDO GRAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-369837

BEFORE: Blackmon, J., McMonagle, P. J., and Cooney, J.

RELEASED: January 7, 2010

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Ricardo Gray appeals the trial court's denial of his motion for leave to file a motion for a new trial. This appeal is Gray's eighth appeal seeking to overturn his conviction and sentence for murder and felonious assault. The salient facts leading to Gray's conviction and sentence are set forth in *State v. Gray*.[1] The history of his case is contained in the prior decisions of this court and of the Ohio Supreme Court.[2] In this appeal, Gray assigns the following error for our review:

> **"I. The trial court erred and abused its discretion in denying appellant's motion for leave to file motion for new trial and supplemental motion for leave to file motion for new trial thereby violating appellant's due process rights under the United States and Ohio Constitutions."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} In November 1998, the Cuyahoga County Grand Jury indicted Gray for one count of aggravated murder and two counts of attempted aggravated

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[1](July 27, 2000), Cuyahoga App. No. 76170. (*Gray* I).

[2]See *State v. Gray* (2000), 90 Ohio St.3d 1469; *State v. Gray* (Sept. 17, 2001), Cuyahoga App. No. 76170 (*Gray* II); *State v. Gray*, Cuyahoga App. No. 76170, 2002-Ohio-1093 (*Gray* III); *State v. Gray*, Cuyahoga App. No. 81474, 2003-Ohio-436 (*Gray* IV); *State v. Gray*, Cuyahoga App. No. 82841, 2003-Ohio-6643 (*Gray* V); *State v. Gray*, 102 Ohio St.3d 1460, 2004-Ohio-2569; *State v. Gray*, Cuyahoga App. No. 83926, 2004-Ohio-5861(*Gray* VI); *State v. Gray*, Cuyahoga App. No. 84677, 2004-Ohio-7030 (*Gray* VII).

murder, each count with a firearm specification. On February 18, 1999, a jury found him guilty of the lesser included offenses of murder, felonious assault, and the firearm specifications. The trial court sentenced him to fifteen years to life for murder, five years for felonious assault, and three years for the firearm specifications to be served consecutively.

{¶ 4} *Gray* I sets out this court's affirmance of his conviction and sentence. In *Gray* V, this court reviewed and overruled his assigned errors regarding the trial court's denial of his motion for a new trial based on newly discovered evidence. The newly discovered evidence consisted of two affidavits from witnesses Anthony Mixon and Arthur Jackson, Sr. Both Mixon and Jackson testified in *Gray* I that Gray was the shooter; however, in *Gray* V*,* they recanted their stories. The trial court held that the request for a new trial was untimely and failed to establish that the evidence would result in a not guilty verdict. We affirmed the trial court's decision, and the Ohio Supreme Court declined further review.[3] Gray then moved for leave again, and in *Gray* VII*,* we ruled that the doctrine of res judicata barred any further consideration. However, while *Gray* VII was pending, Gray filed for leave to file a motion for new trial. In that motion, Gray argued in support of his request that he had obtained newly discovered exculpatory evidence; he attached affidavits from Quandale Johnson, Kenneth Bell, and himself.

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[3]See *Gray* VI.

{¶ 5} Affiant Johnson averred that he was familiar with the shooting and claimed that Gray was not the shooter; instead an individual named Benny was the shooter. Bell also averred that Gray was not the shooter; he stated that Gray had in fact been injured, and driven to the hospital prior to the shooting, and that Benny was the shooter.

{¶ 6} The trial court denied Gray motion for leave to file a motion for a new trial. Thereafter, Gray filed a citizen's petition and appealed the *Gray* VII decision to the Ohio Supreme Court. On May 25, 2005, the Ohio Supreme Court declined jurisdiction and dismissed the appeal, citing lack of any substantial constitutional question of law.

{¶ 7} On September 26, 2008, Gray filed another motion for leave to file a motion for a new trial; he cited as grounds newly discovered evidence. The motion included a new affidavit from Mixon, who averred that he had learned that the shooter's last name was Kern. Mixon also averred that he had seen a photograph of Kern, and he was positive that Kern was the shooter. Gray also provided the affidavits of Michael Steele, Jr. and Kenneth Bell, both of whom averred that Kern was the shooter.

{¶ 8} On December 4, 2008, the trial court denied the motion without a hearing. Gray filed a motion for reconsideration and a supplemental motion for leave to file a motion for new trial. In the supplemental motion for leave to file a motion for new trial, Gray attached an affidavit detailing how he eventually learned

Benny's last name was Kern. In the affidavit, Gray averred that after he learned Benny's last name, he obtained a picture of Kern, which he showed to Mixon, who confirmed that Kern was the shooter.

{¶ 9} In addition, Gray attached an affidavit of Duane Washington, who averred that he was present at the shooting. Washington also averred that he was later incarcerated with Benny Kern, who told him that he had been shooting at Washington and others on the night in question. On January 7, 2009, the trial court denied Gray's motion for reconsideration and his supplemental motion for leave to file a motion for a new trial. This appeal followed.

Motion for Leave to File

{¶ 10} In the sole assigned error, Gray argues the trial court erred when it denied his motion for leave to file a motion for a new trial.

{¶ 11} At the outset, we note that this court, in *Gray* VII,[4] held that res judicata barred this court from any further consideration of this matter. We stated the following:

> **"* * * [B]ecause this court has already addressed this issue in *Gray* V and found that Gray is not entitled to a new trial, the doctrine of res judicata bars any further consideration. See *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, 1996-Ohio-337; *State v. Perry* (1967), 10 Ohio**

[4]Cuyahoga App. No. 84677, 2004-Ohio-7030.

St.2d 175, 226 N.E.2d 104. It is well-established that 'under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.' *Perry*, supra, at 180, 226 N.E.2d 104. Accordingly, we find that the trial court did not abuse its discretion in denying Gray leave to file a second motion for a new trial because he failed to raise any issue different from the issues this court previously adjudicated."[5]

{¶ 12} In the instant appeal, Gray raises the identical issue raised in his prior motions for a new trial. The doctrine of res judicata bars consideration of his present claim. Although res judicata resolves this matter, we nevertheless address his motion for leave to file a motion for new trial.

{¶ 13} Crim.R. 33(A)(6) sets forth the guidelines for filing a motion for a new trial based on newly discovered evidence.[6] In discussing that rule, *State v. Morgan* held: "In order to be able to file a motion for a new trial based on newly discovered evidence beyond the one hundred and twenty days prescribed in the

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[5]Id.

[6]*State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178.

above rule, a petitioner 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.'"[7]

{¶ 14} The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."[8]

{¶ 15} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge."[9]

{¶ 16} Thus, in reviewing the trial court's refusal to grant leave to file a motion for new trial, we will examine the record to determine whether appellant presented sufficient evidence to satisfy the "clear and convincing evidence" standard; however, we cannot substitute our judgment for that of the trial court if competent, credible evidence supports the trial court's decision.

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[7]3rd Dist. No. 17-05-26, 2006-Ohio-145.

[8]*Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

[9]*State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

{¶ 17} "[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."[10]

{¶ 18} In addition to demonstrating that a petitioner was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial, the petitioner also must show that he filed his motion for leave within a reasonable time after discovering the evidence relied upon to support the motion for new trial.[11] If there has been a significant delay, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay.[12]

{¶ 19} We review both aspects of Crim.R. 33 permission for leave to file a motion for a new trial and the substantive ruling on the motion for a new trial under the abuse of discretion standard.[13] An abuse of discretion is more than an error of

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[10]*State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶7.

[11]*State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶37; *State v. Elersic*, 11th Dist. No. 2007-L-104, 2008-Ohio-2121, ¶20; *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶49.

[12]Id.

[13]See *State v. Bates*, 10th No. 08AP-753, 2008-Ohio-1422, ¶9.

law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.[14]

{¶ 20} In the instant case, Gray's motion for leave to file a motion for new trial states in pertinent part as follows:

> **" * * * The defendant in this case has been unavoidably prevented from filing this motion for a new trial within one hundred twenty days after the day upon which the verdict was rendered as key parts of the new evidence have only recently come to light. * * * In addition to the prior affidavit of Anthony Mixon, there is now a new affidavit from Mixon in which he reiterates that his trial testimony identifying Gray as the shooter was false and made under duress, and that the actual shooter was a male known only as 'Benny.' He has now learned that the last name of that individual is 'Kern.' He has now seen a photo of Benny Kern from the Ohio Department of Rehabilitation and Correction website, and confirms that Benny Kern is the person he saw doing the shooting. * * * Further, an individual named Michael Steele has now been located and identified as a witness to the shooting. He has provided an affidavit in which he, too, states that the actual shooter that night was an individual named Benny Kern. * * * This, too, is information not previously known to or available to Mr. Gray as he was not aware that Steele had been a witness to the shooting. * * * Additional new evidence is in the form of an affidavit from an individual named Kenneth Bell. Mr. Bell witnessed the shooting and states that Benny Kern was the shooter. He states that Mr. Gray was taken to the hospital that night and did not commit the crime for which he is imprisoned. * * * This, too, is information not previously known to Gray as he was not aware that Bell was a witness to the shooting."[15]**

{¶ 21} At the outset, we note that in Gray's motion for leave, there is a complete absence of any indication of a time frame in which Gray allegedly

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[14]*State v. Adams* (1980), 62 Ohio St.2d 151, 157.

[15]Gray's Motion for Leave.

acquired this newly discovered evidence. Noticeably absent from the motion is any indication of when Mixon learned the last name of the individual he alleges is the actual shooter. Also absent is any indication of when Gray learned from Mixon that Kern was the last name of the alleged shooter.

{¶ 22} Without any time frame, Gray has failed to provide the trial court with any facts for the trial court to determine whether he was unavoidably prevented from discovering this new evidence. Further, without providing a time frame for when this newly discovered evidence was acquired, Gray has failed to provide the trial court with the facts necessary for its determination of whether the motion for leave was filed within a reasonable time after acquiring the newly-discovered evidence.

{¶ 23} Thus, without providing the trial court with any information about the time line of the acquisition of the newly discovered evidence, the only conclusion that the trial court could reach is that the evidence was acquired sometime after Gray's preceding motion for leave was filed. Since the record indicates that Gray's preceding motion for leave was filed on June 11, 2004, more than four years prior to the present motion, Gray's present motion for leave, which was filed on September 28, 2008, is patently untimely.

{¶ 24} As such, we refrain from concluding that the trial court abused its discretion in denying what amounts to Gray's fourth attempt to get a new trial on the grounds of newly-discovered evidence.

{¶ 25} Nonetheless, in support of his claim that he was unavoidably prevented from acquiring this newly discovered evidence, Gray cites *State v. Houston*,[16] one of our recent decisions, which he claims to be remarkably similar to the facts of the instant case. *Houston* does involve a quest to discover the last name of an alleged assailant. In *Houston*, the petitioner presented some semblance of a time frame and the steps taken to discover the alleged assailant's last name.

{¶ 26} In *Houston,* we wrote:

> **"* * * Houston had engaged the services of an investigator in 2006. He gave the investigator the surname "Ware" but told her that he knew the person by the nickname 'Popeye.' A person who lived in the area near where the robbery occurred recalled a person with the same nickname and thought that this person originally came from Indiana. At some point, Houston learned that this person had the first name of either 'Lamar' or 'Demarr,' but could not be certain. The investigator made records checks in Indiana and made contact with the Gary Police Department. Those contacts led her to discover Demarr Eugene Ware, who had two different social security numbers. The investigator eventually contacted the Cobb County, Georgia Sheriff's Department and obtained a booking sheet and mug shot photo of Ware. Pope then identified Ware as the man he knew as 'Popeye' and whom he claimed had been the robber. Bobby Ray Slaughter, who lived in the neighborhood at the time of the robbery, also saw Ware's mug shot and identified him as the person whom he knew from the time of the robbery by the nickname 'Popeye.'"[17]**

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[16]Cuyahoga App. No. 90780, 2009-Ohio-224.

[17]Id.

{¶ 27} Based on the information Houston provided in his motion for leave, we concluded that the trial court could have rationally viewed those facts as showing by clear and convincing evidence that Houston had been unavoidably prevented from discovering Ware's identity and location.

{¶ 28} In Gray's latest motion for leave to file a motion for new trial, he relies heavily on the affidavit of Mixon as the source leading to the discovery of the alleged shooter's last name. As previously stated, Mixon testified at the trial, identified Gray as the shooter, but later recanted his testimony, and claimed that he was coerced by the police to identify Gray as the shooter.

{¶ 29} A witness's recantation of testimony can be newly discovered evidence if the court finds the new testimony credible and if the new testimony would materially affect the outcome of the trial.[18] In determining the credibility of a witness's recanted testimony, newly discovered evidence that recants testimony given at trial is looked upon with the utmost suspicion.[19] Recanting affidavits and witnesses are viewed with extreme suspicion because the witness, by making

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[18] *State v. Burke*, 10th Dist. No. 06AP-686, 2007-Ohio-1810, ¶18, citing *Toledo v. Easterling* (1985), 26 Ohio App.3d 59.

[19] *State v. Jones*, 10th Dist. No. 06AP-62, 2006-Ohio-5953, ¶25; *State v. Covender*, 9th Dist. No. 07CA009228, 2008-Ohio-1453, ¶11; *State v. Saban* (Mar. 18, 1999), Cuyahoga App. No. 73647. See, also, *United States v. Chambers* (C.A.6, 1991), 944 F.2d 1253, 1264.

contradictory statements, either lied at trial, or in the current testimony, or both times.[20]

{¶ 30} It must be noted that the same trial judge who presided over the trial has also presided over the lengthy procedural history that has ensued. Because it is the trial court's obligation to measure the credibility of witnesses, in order to grant a motion for new trial based on recanted testimony, the trial court must be reasonably well satisfied that the trial testimony initially given by the witness was false and, by implication, that the recanted testimony is credible and true.[21] Since the trial court observed Mixon testify at the trial, it is clear from the trial court's decision denying Gray's motion for leave, that it did not believe Mixon's recantation and present averments.

{¶ 31} As it pertains to the affidavit of Steele, which states in total as follows:

> **"On the night of the shooting that Ricardo Gray was convicted of I Michael Steele Jr saw Benny Kern start shooting and I started running for my safety."**

{¶ 32} Steele provided the above affidavit, claiming to be an eyewitness to the shooting, some ten years after the incident. Gray, who was represented by counsel, fails to indicate why neither he nor his trial counsel were prevented from investigating the matter and discovering that Steele witnessed the incident. We

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[20] *Jones*, citing *United States v. Earles* (N.D. Iowa1997), 983 F.Supp. 1236, 1248.

[21] *Cleveland* at ¶56; *Jones* at ¶25; *Covender*.

conclude Gray has failed to demonstrate how he was unavoidably prevented from obtaining these statements at an earlier time.

{¶ 33} Consequently, we find no abuse of discretion in the trial court's decision denying Gray's motion for leave to file a motion for new trial. Accordingly, we overrule Gray's sole assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR