

[Cite as *State v. Gray*, 2010-Ohio-5842.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94282

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY GRAY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-487147

BEFORE: McMonagle, J., Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 2, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Larry Gray, appeals from a judgment denying his motion for a new trial. He raises two assignments of error for our review:

{¶ 2} “[1.] The trial court abused its discretion in overruling appellant’s motion for a new trial.

{¶ 3} “[2.] Larry Gray’s convictions are voidable and/or deserving of an evidentiary hearing due to perjured testimony.”

{¶ 4} We find merit in part to Gray’s second assignment of error, reverse the judgment of the trial court, and remand for an evidentiary hearing on his motion for new trial.

Procedural History and Factual Background

{¶ 5} Gray was indicted for aggravated murder for allegedly killing DeJuan Harvey. Gray’s first jury trial resulted in a mistrial. The following evidence was submitted to the jury at his second trial.

{¶ 6} Darnetta Simpson testified that near dawn on May 2, 2006, she was awakened by a gunshot. She looked out her window and saw a man shoot the victim four or five more times. She said the shooter was wearing dark jeans and a “hoodie” sweatshirt. She then saw the shooter flee in a dark-colored car.

{¶ 7} Danuiell Love testified that Gray was the father of her eight-year-old daughter. According to Love, Gray was at her house in the early morning hours of May 2, 2006. He was there with Latasha McClain (who also was indicted for Harvey’s murder). Love said that while the three of them were talking, Harvey walked by and McClain indicated that Harvey was her daughter’s father. Love testified that McClain and Harvey argued for few minutes, and then Harvey walked away. Immediately after Harvey walked away, Love said that Gray and McClain left in a light-colored Taurus, and drove in the same direction that Harvey had walked.

{¶ 8} Love then testified that soon after Gray and McClain left, she heard a gunshot, and she saw Gray standing over a man, shooting him several times. Love went to the victim and recognized him as Harvey. She said that Harvey's cell phone rang, and she answered it. The caller was screaming that Harvey was her baby's father and was asking whether he was dead. Love testified that Gray had been wearing a white t-shirt and jeans.

{¶ 9} Adrian Robinson testified that Love was his girlfriend. He corroborated Love's testimony about the argument between McClain and Harvey.

{¶ 10} McClain testified that she was with Gray the evening before and the morning of the shooting. She said Gray was wearing a white t-shirt and jeans. She and Gray went to Love's house around 3:00 or 4:00 a.m. on May 2, 2006. While there, she called Harvey to ask him to bring her some of their daughter's clothes. She testified that sometime later, Harvey walked past Love's house and she had an argument with Harvey. After Harvey left, McClain and Gray got into a car and drove in the same direction that Harvey had walked. She then said that Gray parked the car and told her that he had to use the bathroom. Soon after, she heard five gunshots, and then Gray returned to the car.

{¶ 11} McClain testified that she and appellant left for Florida six days after the shooting and while there, they got married. After being extradited to Cleveland, McClain accepted a plea deal in which she pleaded guilty to obstruction of justice in exchange for her agreement to testify against Gray.

{¶ 12} The jury convicted Gray of aggravated murder and the accompanying firearm specifications in January 2008. The trial court also found him guilty of having a weapon while under disability. He was sentenced to 28 years to life in prison. This court upheld his convictions on April 16, 2009, in *State v. Gray*, 8th Dist. No. 90981, 2009-Ohio-1782.

{¶ 13} On August 25, 2009, Gray moved the court for a new trial on the grounds of newly discovered evidence pursuant to Crim.R. 33(A)(6). He attached an affidavit of Brian Donan. Donan averred that he was the one who shot DeJuan Harvey, not Gray. The trial court summarily denied Gray's motion for a new trial on August 28, which Gray did not appeal.

{¶ 14} Gray also moved this court to reopen his appeal, which we denied, and moved to file a delayed appeal with the Ohio Supreme Court, which it denied. *State v. Gray*, 8th Dist. No. 90981, 2009-Ohio-4360; *State v. Gray*, 122 Ohio St.3d 1520, 2009-Ohio-4776, 913 N.E.2d 456.

{¶ 15} On October 29, 2009, Gray moved for a new trial a second time based on the same grounds, namely, newly discovered evidence. But this time, he attached Love's affidavit. In the affidavit, Love recanted her trial testimony. She stated that at the time of Gray's trial, she was dating Adrian Robinson (who also testified at Gray's trial and corroborated Love's trial testimony). Love said that it was actually Robinson who she saw kill DeJuan Harvey over a drug dispute. She stated that she lied at the trial to protect Robinson, who she had

hoped to marry. She also lied because she was angry with Gray because he had promised to marry her, but then he married McClain. Love explained that Gray was her daughter's father, and she now regretted taking her "daughter's father away from her."

{¶ 16} The trial court summarily denied Gray's second motion for a new trial on November 3, and Gray appealed.

Standard of Review

{¶ 17} A ruling on a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 64 N.E.2d 54, paragraph one of the syllabus; *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus. An abuse of discretion "implies that the court's attitude [was] unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 4 N.E.2d 144.

New Trial Motion Filed Beyond the 120-Day Period

{¶ 18} Crim.R. 33(A)(6) permits a convicted defendant to file a motion for a new trial upon grounds that new "evidence material to the defense" has been discovered that "the defendant could not with reasonable diligence have discovered and produced at the trial." A motion based on newly discovered evidence must be filed within 120 days after the day of the verdict, unless the trial

court finds by clear and convincing evidence that the defendant was “unavoidably prevented” from discovering the new evidence. Crim.R. 33(B).

{¶ 19} A defendant who seeks a new trial after the 120-day time period must first obtain leave from the trial court, demonstrating by clear and convincing evidence that he or she was unavoidably prevented from timely filing the motion for a new trial or 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 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.” *State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859.

{¶ 20} A defendant is entitled to a hearing on his motion for leave if he submits “documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence” at issue. *State v. York* (Feb. 18, 2000), 2d Dist. No. 99-CA-54; *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶19.

{¶ 21} Gray did not formally request leave to file his untimely new-trial motion. “Despite that deficiency, we do not find that the rule should be interpreted so technically as to prevent an untimely motion that does not specifically request leave.” *State v. Franklin*, 7th Dist. No. 09MA96, 2010-Ohio-4317, ¶17.

Especially when the defendant submits an affidavit that would exonerate him, thus disclosing a strong probability of a different result if a new trial were granted.

See *State v. Gaines*, 1st Dist. No. C-090097, 2010-Ohio-895 (Trial court abused its discretion in not granting the defendant an evidentiary hearing when he submitted an affidavit from an eyewitness to the murder, who was now recanting.).

{¶ 22} In support of his first motion for new trial, Gray submitted an affidavit from a man claiming he shot DeJuan Harvey. Incredibly, the trial court denied this motion without comment 72 hours after Gray filed it.

{¶ 23} In support of his second motion for a new trial, Gray submitted an affidavit from Love in which Love clearly recanted her trial testimony and asserted Gray's innocence. The trial court denied the motion without comment five days after Gray filed it.

{¶ 24} Evidence that merely impeaches or contradicts evidence in the former trial is insufficient to support a motion for a new trial. *State v. Petro* (1940), 148 Ohio St. 505, 76 N.E.2d 370; *State v. Lopa* (1917), 96 Ohio St. 410, 117 N.E. 319. The test, however, is “whether the newly discovered evidence would create a strong probability of a different result at trial, or whether it is merely impeaching or contradicting evidence that is insufficient to create a strong probability of a different result.” *Dayton v. Martin* (1987), 43 Ohio App.3d 87, 90, 539 N.E.2d 646. Gray submitted two affidavits that do more than merely

impeach or contradict former testimony; if true, they would exonerate Gray. Thus, the affidavits on their face create a strong probability of a different result.

{¶ 25} We further note that the evidence presented at Gray’s trial was not overwhelming. There was no physical evidence. He was essentially convicted on the testimony of Love and McClain. Love is now recanting. And McClain had also been charged with Harvey’s murder, but she pleaded guilty to a significantly lesser crime in exchange for testifying against Gray.

{¶ 26} This court upheld Gray’s convictions essentially because of Love’s and McClain’s testimony. In response to one of Gray’s arguments on appeal that the prosecutor withheld exculpatory evidence, we concluded, “[t]he fact that the police interviewed another possible suspect is not enough to demonstrate prejudice to appellant, especially in this case where several witnesses testified appellant was the shooter.” *Id.* at ¶42. The “several witnesses” were Love and McClain, and Love has now recanted. And although we concluded that the jury did not lose its way in Gray’s manifest weight argument, we noted, “[i]t is true that there was conflicting testimony from the witnesses in their descriptions of the shooter’s clothing and vehicle. [And] [t]he only eyewitness, Ms. Simpson, described the shooter as leaving the crime scene without a limp, while other witnesses testified that appellant had a noticeable limp.” *Id.* at ¶42. We also relied on “several other witnesses’ testimony” in overruling his prosecutorial misconduct argument: “There were several other witnesses to the shooting who

were present before, during, or after the shooting who were able to identify appellant.” *Id.* at ¶67. Again, the “several other witnesses” who identified Gray were Love and McClain.

{¶ 27} Thus, although the record in the former trial contains McClain’s testimony supporting Gray’s guilt, the trial court could not properly discredit Love’s affidavit on its face and deny the motion without a hearing — at least in the absence of internal inconsistencies in the affidavit sufficient to destroy its credibility on its face. Further, we note that the only objective eyewitness to the shooting, Darnetta Simpson, testified that the shooter was wearing a “hoodie” and left the scene in a dark car. Simpson’s testimony contradicted that of Love’s and McClain’s — that Gray was wearing a white t-shirt and driving a light car.

{¶ 28} “Whether evidence was unavailable to an accused at trial is, to some extent, to be determined by whether the source of the evidence was available for examination or cross-examination by an accused[’s] counsel at trial.” *State v. Wright* (1990), 67 Ohio App.3d 827, 832, 588 N.E.2d 930, citing *State v. Lopa*, 96 Ohio St. at 412, and *State v. Eubank* (1987), 38 Ohio App.3d 141, 528 N.E.2d 1294. But “when a witness later admits that he lied at trial, that consideration is greatly diminished.” *Id.*

{¶ 29} Accordingly, we conclude that the trial court abused its discretion when it denied Gray’s motion for new trial without an evidentiary hearing.

Judgment reversed and remanded for an evidentiary hearing on Gray's motion for a new trial.

It is ordered that appellant recover of appellee 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.

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

CHRISTINE T. MCMONAGLE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY