

[Cite as *State v. Christinger*, 2010-Ohio-6192.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95109

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

QUINCY CHRISTINGER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498981

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Quincy Christinger, appeals from an order denying his Crim.R. 33(B) motion for leave to file a motion for a new trial on grounds of newly discovered evidence in two forms: a trial witness who allegedly recanted his testimony implicating Christinger and a new witness to the crime.

{¶ 2} In 2008, the court found Christinger guilty of two counts of felonious assault; one count of breaking and entering; one count of improperly discharging a firearm into a habitation; and two counts of endangering children. The evidence at trial showed that Christinger attended a party at which Lisa Franklin and her siblings were present. Christinger had a physical altercation with one of the siblings and left the party. When Franklin and her siblings drove home from the same party, Christinger called Franklin's sister, Lidia, and said he was coming to her house to "fuck you all up." After the partygoers arrived at their house, Christinger and several others drove up. Christinger called for the sibling who struck him while another in his group tried to kick open the front door to the house. Shots were fired. Lisa Franklin testified that she saw Christinger fire a gun at the house. Another victim, Charles Finley, testified that he was shot in the calf during a struggle with an unidentified assailant, although he conceded that he had earlier identified Christinger as the shooter from a photo array.

{¶ 3} We affirmed the conviction in *State v. Christinger*, 8th Dist. No. 91984, 2009-Ohio-3610. In 2010, Christinger sought leave to file a motion for a new trial,¹ offering an affidavit from Finley in which he purported to

¹Christinger alternatively styled his motion as one for postconviction relief, but he made no specific argument in that vein, nor did he cite to R.C. 2953.21. He likewise makes no argument to that effect in this appeal, so we construe the motion as one for

recant his trial testimony that he saw Christinger with a gun. An affidavit from Lidia Franklin, who did not testify at trial, stated that she did not see who shot into the house. The court denied leave without opinion.

II

{¶ 4} Crim.R. 33(A)(6) permits a convicted defendant to file a motion for a new trial within 120 days after the day of the verdict on grounds that new evidence material to the defense has been discovered. If a motion based on newly discovered evidence is filed more than 120 days after the verdict, the defendant must first seek leave by making a showing by clear and convincing evidence that the defendant was “unavoidably prevented” from discovering the new evidence. Crim.R. 33(B). A defendant is unavoidably prevented from discovering evidence when the defendant had no knowledge of the existence of the ground supporting the motion for new trial and could not, in the exercise of reasonable diligence, have learned of the existence of that ground within the required time for filing the motion for new trial. *State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859. We cannot disturb the court’s decision to either grant or deny leave under Crim.R. 33 unless the court abused its discretion. *State v. Pinkerman* (1993), 88 Ohio App.3d 158, 160, 623 N.E.2d 643.

III

{¶ 5} The court did not abuse its discretion by denying leave to file a motion for a new trial because neither affidavit contained new evidence.

A

{¶ 6} Finley's affidavit stated that he did not see Christinger with a gun and that he identified Christinger only at the urging of family members. This statement is not new evidence because it does not contradict Finley's trial testimony. Finley testified that he had been sitting on the porch drinking when he saw "three guys with guns." When asked if he knew who they were, he said, "people were saying this person had a gun, that person had a gun, but off the top of my head, from my recollection, no." He testified that he struggled with an unknown assailant and that the assailant's gun discharged during the struggle. The state then asked Finley about a statement he gave to the police in which he identified Christinger from a photograph as the "man who shot me." Finley testified that he was still intoxicated from the night before when he identified Christinger and that "when I was in the house, everybody was saying that's who shot me."

{¶ 7} Finley's affidavit does not deviate in any material way from his trial testimony. Although Finley signed a police statement identifying Christinger as the person who shot him, he testified otherwise, saying that he did not know the identity of the person who shot him. He specifically

disavowed his identification of Christinger as the shooter and blamed intoxication and pressure from his family as the reason why he gave Christinger's name to the police. Finley's affidavit was nothing more than a recapitulation of his trial testimony, so the court did not abuse its discretion by finding Finley's affidavit did not contain newly discovered evidence.

B

{¶ 8} Lidia Franklin's affidavit offered nothing material to the defense.

The affidavit stated that she looked out the window and saw five to eight people in the front yard and that Christinger was standing on the sidewalk.

She turned to go downstairs and heard a loud noise. By the time she made it outside, everyone was gone.

{¶ 9} These statements did not contradict anything said at trial nor were they material to the shooter's identity. Lidia stated, in essence, that she did not see who fired the shots at the house. This is not an affirmative statement that Christinger did not fire the shots. At best, Lidia could only testify that she did not witness the shooting, so her testimony neither implicated nor exonerated Christinger. It would have added nothing to the evidence.

{¶ 10} Even if Lidia's testimony could be considered material to the defense, Christinger failed to show that he was unavoidably prevented

from obtaining this information prior to trial. Lidia's name was mentioned by several witnesses as being present when the crimes were committed, so her identity would have been known to the defense prior to trial. Absent any plausible explanation as to why it took Christinger 20 months to obtain Lidia's affidavit, the court did not abuse its discretion by denying leave to file a motion for a new trial.

IV

{¶ 11} Christinger's final argument is procedural: he maintains that the court improperly exercised jurisdiction by denying leave to file a motion for a new trial because jurisdiction had been vested with this court — he had a pending companion appeal in Appeal No. 94632, challenging the court's failure to advise him of postrelease control.

{¶ 12} When an appeal is taken, the trial court is divested of jurisdiction until the case is remanded to it by the appellate court, except where the retention of jurisdiction is consistent with that of the appellate court to review, affirm, modify, or reverse the order from which the appeal is perfected. *State v. Abboud*, 8th Dist. Nos. 87660 and 88078, 2006-Ohio-6587, at ¶11. This rule typically applies to bar trial court action on judgments that are pending on direct appeal. For example, trial courts have no jurisdiction to consider motions for new trials when direct appeals from convictions are pending because the trial court could conceivably

reverse a conviction on the same basis as that being affirmed by an appellate court. See *State v. Loper*, Cuyahoga App. Nos. 81297, 81400 and 81878, 2003-Ohio-3213, at ¶104; *State v. Kenney*, Cuyahoga App. Nos. 81752 and 81879, 2003-Ohio-2046, at ¶58. In other circumstances, we have held that a trial court had no jurisdiction to consider a motion for relief from judgment on a postconviction petition that was pending on direct appeal because vacating the judgment would be inconsistent with our power to affirm the judgment. See *State v. Shazor*, 8th Dist. No. 93846, 2010-Ohio-3197, at ¶4.

{¶ 13} A different situation arises in this case. The court's decision to deny leave to file a motion for a new trial was consistent with this court's consideration of Christinger's pending appeal on a motion to vacate his sentence. Acting on a motion for a new trial is not a ruling on the merits of the motion and thus could not have affected our ability to hear and resolve issues presented in the pending appeal relating to sentencing issues.

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 issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR