

[Cite as *State v. Brown*, 2011-Ohio-1080.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95253

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509535

BEFORE: Celebrezze, P.J., Jones, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, David Brown, appeals from the denial of his motion for a new trial based on newly discovered evidence. For the following reasons, we affirm the trial court's judgment.

Procedural History

{¶ 2} In April 2008, the grand jury indicted appellant on one count of attempted murder in violation of R.C. 2923.02 and R.C. 2903.02(A), with firearm specifications; two counts of felonious assault in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), with firearm specifications; and one count of having weapons while under disability in violation of R.C. 2923.12(A)(3).

{¶ 3} A jury trial commenced, and the jury found appellant guilty on all four counts and specifications. The trial court merged Counts 1, 2, and 3, as well as the firearm specifications. Appellant was sentenced to five years in prison for the merged counts, five years for Count 4, and three years for the firearm specifications. The court ordered that the sentences run concurrently, but consecutively to the three-year firearm specifications, for an aggregate eight-year prison term along with five years of postrelease control.

{¶ 4} Subsequently, appellant filed a direct appeal to this court, and his convictions and sentence were affirmed on February 25, 2010. *State v. Brown*, Cuyahoga App. No. 92814, 2010-Ohio-661.

{¶ 5} On May 21, 2010, appellant, pro se, filed a motion for a new trial and a motion for leave to file for a new trial. Both motions were denied without a hearing on June 4, 2010. It is from this ruling that appellant makes the instant appeal.

Statement of Facts

{¶ 6} In 2007, the victim, Anthony Doss, became friends with appellant and his wife, Nora, when Doss moved into the house across the street. The Browns introduced Doss to Leothia Scott, who worked with Nora. Doss and Scott began dating after that.

{¶ 7} Thereafter, Doss's friendship with appellant and Nora began to deteriorate after appellant asked Doss to take responsibility for a condom that Nora found in their home. The condom belonged to appellant, but Doss agreed to take the blame for it.

Doss stated that, after that, he did not feel comfortable being around Nora, and so he stopped going to Brown's home.

{¶ 8} Doss stated that, in April 2008, he was on the sidewalk in front of his house when appellant yelled from across the street, "I can't help it if you f***ed things up with your bitch." Doss became angry at this and was "ready to start a fight." He began to walk toward appellant's house and, as he did, he pulled his cell phone off of his belt and began to take off his shirt to fight. At that time, appellant came off his porch, "reached in his back, and pulled a gun out and started shooting." Doss believed appellant shot at him about six times; he was hit three times, in both legs and in the stomach. Doss stated he then turned around and "slowly walked" back to his house, and appellant shouted at him, "you don't walk up on nobody, Tone." Doss spent three-and-a-half weeks in the hospital as a result of being shot.

{¶ 9} At all times, appellant contended that Doss fired the first shots and that he only shot back in self defense.

Law and Analysis

Motion for New Trial

{¶ 10} In appellant's lone assignment of error, he argues that the trial court erred by denying his motion for a new trial without considering the merits and without conducting a hearing. Specifically, he argues that newly discovered evidence relating to the mental health of the state's witness creates a strong probability that there would have

been a different outcome in his case if the evidence was presented to the jury at his original trial.

{¶ 11} “A motion for new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. The term “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 12} 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 trial. *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶15; see Crim.R. 33(A)(6).

{¶ 13} Pursuant to Crim.R. 33, motions for a new trial based on newly discovered evidence shall be filed within 120 days of the verdict. 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). *State v. Fortson*, Cuyahoga App. No. 82545, 2003-Ohio-5387. “[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, 145-146, 483 N.E.2d 859; *State v. Wilson*, Montgomery App. No. 23247, 2009-Ohio-7035, ¶8.

{¶ 14} 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. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶19. Although a defendant may file his motion for a new trial along with his request for leave to file such motion, “the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay * * * If the defendant submits documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there was unavoidable delay.” *State v. Stevens*, Montgomery App. Nos. 23236 and 23315, 2010-Ohio-556, at ¶11. Where a motion for a new trial based on newly discovered evidence does not comply with the requirements of Crim.R. 33(B), the motion should be dismissed. *State v. Kiraly* (1977), 56 Ohio App.2d 37, 381 N.E.2d 649.

{¶ 15} Appellant was convicted in November 2008; however, he did not file his motion for a new trial until May 2010, well beyond the 120-day limit under Crim.R. 33(B). Consequently, appellant was required to submit documents that, on their face, supported his claim that he had no knowledge of the ground supporting the motion for a

new trial and that he was “unavoidably prevented” from discovering the evidence within 120 days of his November 2008 verdict.

{¶ 16} We do not believe that appellant has met this burden. Even accepting the newly discovered evidence as true, the affidavits attached to appellant’s motion do not on their face support his claim that he was unavoidably prevented from discovering the evidence contained therein.

{¶ 17} The new evidence supporting appellant’s motion for a new trial involved a copy of a docket from a 2003 case against the victim, Anthony Doss. In that case, Doss was referred to the court psychiatric clinic for a mental health evaluation. Essentially, appellant contends that evidence of Doss’s poor mental health would have been probative to his 2008 case, as it questions the credibility of Doss’s testimony. However, appellant’s affidavit fails to demonstrate that he was unavoidably prevented from discovering this evidence within 120 days of his verdict. The 2003 information appellant now seeks to introduce as new evidence was made part of the public record and was available to him at the time of his 2008 trial. Appellant has failed to demonstrate that he exercised reasonable diligence to uncover this evidence during the period of time that elapsed between the November 2008 verdict and the filing of his motion for a new trial.

{¶ 18} Accordingly, the trial court did not abuse its discretion when it denied appellant’s motion for a new trial without a hearing. Appellant’s sole assignment of error is without merit.

Judgment affirmed.

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.

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

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, J., and
SEAN C. GALLAGHER, J., CONCUR