[Cite as *State v. Braun*, 2011-Ohio-1688.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95271

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY BRAUN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496324

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

RELEASED AND JOURNALIZED: April 7, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Jeffrey Braun, appeals the trial court's judgment denying his motion for a new trial. We affirm.

I. Procedural History and Facts

A. Procedural History

{¶ 2} After a jury trial, Braun was convicted of aggravated murder with a capital specification that the murder was committed in the course of an aggravated robbery with firearm specifications; aggravated robbery with firearm specifications; tampering with evidence; and having a weapon while under a disability. After the mitigation phase, the jury recommended a sentence of life imprisonment without the possibility of parole. The trial court adopted the jury's recommendation and sentenced Braun to life in prison without the possibility of parole.

{¶ 3} Braun appealed his conviction to this court in March 2008. *State v. Braun*, Cuyahoga App. No. 91131, 2009-Ohio-4875 ("*Braun I*"). A year later, in March 2009, while Braun's first appeal was pending before this court, Braun filed a motion for a new trial. The trial court issued an entry stating that it declined to rule on the motion because it lacked jurisdiction while the matter was pending before this court.

{¶ 4} In April 2009, Braun filed a motion in this court seeking a stay of appellate proceedings pending resolution of his motion for a new trial. This court treated Braun's motion as a motion for a limited remand, and granted the motion. No trial court proceedings occurred on the limited remand, however, and in October 2009, this court affirmed the conviction, but reversed the sentence and remanded for resentencing. *Braun I*, ¶1. Braun was resentenced in December 2009. Also in December 2009, after resentencing Braun, the trial court set a hearing for January 2010 on Braun's motion for a new trial. On January 2, 2010, Braun appealed the resentencing judgment entry.

{¶ 5} The January hearing date for Braun's motion for a new trial was rescheduled, and the hearing was held on February 9, 2010. The trial court denied the motion for a new trial in May 2010.

B. Trial Testimony

{¶ 6} Extensive trial testimony was presented. We summarize the facts from this court's opinion from *Braun I* as follows.

{¶ 7} The victim, John Chappell, died on October 25, 2005, from two gunshot wounds to the head. He was found next to an abandoned house on the west-side of Cleveland in a burning Chevrolet Blazer. The Blazer belonged to one of Chappell's acquaintances, Tracy Walsh. Walsh lived in a "dope house" and Chappell had been staying there in the days leading up to his death. Chappell was a drug dealer who supplied Walsh drugs in exchange for her allowing Chappell to use her Blazer.

{¶ 8} On the day of Chappell's murder, Chappell was at Walsh's house, taking a shower when his cell phone rang. Walsh answered the phone, and a man whose voice she recognized as Braun's, asked where Chappell was. When Walsh asked Braun how he was doing, he hung up. When Chappell finished with his shower, Walsh told him that Braun had called. Chappell then hurriedly left Walsh's house driving Walsh's Blazer.

{¶ 9} Michael Graham testified that on the evening of Chappell's murder, he, Roy Fitzer, and Jeremy Payne were "getting high" at the house of an acquaintance, Dave Essenberg. Braun was also there with his acquaintance, codefendant John Shear. According to Graham,

Braun and Shear were "acting anxious," and kept "pressing" for someone to buy them gasoline because their car was out of gas. Graham and some others at the house eventually did go to get gas for Braun and Shear; when they returned to Essenberg's house, they left the gas can on the side of the house. After telling Braun and Shear that the gas can was on the side of the house, Braun and Shear quickly left.

{¶ 10} Graham testified that when he left Essenberg's house, he realized that a car he had earlier stolen was gone, and he thought Braun and Shear had taken it. Upset, Graham and Fitzer stole a radio out of Shear's vehicle. Graham and Fitzer saw Braun driving in the Blazer and Shear following Braun, driving the vehicle Graham had stolen. Later that evening, Graham was watching the news and saw a story reporting that there was a car fire with a woman inside.

{¶ 11} The next morning Graham and Shear met and the two agreed to steal a car. Before leaving, Shear went into the back alley and got a gun from a car parked in the yard of Bobby Fitzer, Roy Fitzer's twin brother.

{¶ 12} While the two were driving around looking for a car to steal, Graham asked Shear if he had anything to do with the woman in the burning car. Shear told Graham that it was not a woman, it was Chappell. Shear told Graham that he and Braun got in an argument with Chappell over drugs, they shot him, and then burned his body. Graham told Essenberg what Shear had said.

{¶ 13} A day or two later, Graham saw Fitzer and Braun at Essenberg's house. Essenberg and Braun got into an argument; during the course of the argument, Graham heard Braun tell Essenberg that he would shoot him like he had shot Chappell and that he would "tell on" Shear if he had to. Braun was also bragging about how many times he had been to court and won.

{¶ 14} Shear later came to Essenberg's house and Braun told Shear that they had to do something about Essenberg because he was "gonna get them knocked" for "running his mouth too much." Braun suggested that maybe they should shoot Essenberg. Braun and Fitzer then left Essenberg's house.

{¶ 15} On November 1, 2005, Braun and Fitzer were arrested for a robbery and attempted murder in another case. They were both asked about this case, and after being advised of his rights, Braun agreed to talk. At the time, Chappell had not been positively identified as the victim.[1]

{¶ 16} Braun said that he did not know anything about Chappell's death, but he had heard that he was the last person to see him alive. He denied seeing Chappell on the night of his death, but said that he had called Chappell earlier that evening because he needed gasoline. According to Braun, he was riding around with Shear, whom he only knew as "Cheese." They ran out of gas and went to a pizza shop and called Chappell for gas. Braun and Cheese waited for a half hour and then called Chappell again; Chappell said that he forgot, so Braun

told him "never mind, we have the gas." According to Braun, Cheese left and got some gas, but he did not know how.

{¶ 17} The Cleveland police received letters from an inmate by the name of Matthew Stedman,[2] who claimed that Braun had admitted to numerous criminal acts, including the murder of Chappell. Stedman was interviewed, and a statement was taken. Stedman testified about how Braun told him he had killed Chappell and how he had set up alibi witnesses, which included his ex-girlfriend. Braun told Stedman that if he ever testified against him, Braun would have him killed.

{¶ 18} Braun's ex-girlfriend testified that Braun asked her to be his alibi for the night of the murder, and to say that they had a spaghetti dinner together. At first she agreed, but then she changed her mind. The ex-girlfriend also testified that Braun asked her to check a certain location for the gun and if she found it to throw in the lake. She checked, but did not find the gun; Braun told her that Shear must have gotten it.

{¶ 19} On February 14, 2006, Braun called the police from jail and told them that he wanted to speak with them again. Braun made a second statement. He said he saw the statement Roy Fitzer had given wherein he told the police that Braun gave him a gun "with a body on it," meaning it had been used in a murder. Braun denied having anything to do with

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[1]The body was positively identified as Chappell's on November 3.

[2]Stedman requested consideration in his own case from the County Prosecutor for his testimony against Braun, but his request was denied.

Chappell's murder. Braun said that he had been hanging out with Shear for about three days before Chappell was killed and that they were getting high and taking "dope" from "dope boys" and not paying for it.

{¶ 20} According to Braun, on the day of the murder, he was with Shear and they were "tricking some dope boys out of their drugs." He said they ran out of gas and walked to a pizza shop, ordered a pizza, and called Chappell for gas. Braun said after waiting for awhile, he went across the street to a deli and called Chappell again. He said that Shear pulled up, they got their pizza and went to a friend's house to smoke "dope." Shear then took Braun to his girlfriend's house, where she had made him a spaghetti dinner, they had some friends over, played spades, and smoked crack.

{¶ 21} Braun further told the police that sometime between 10:00 and 10:30 that evening, Shear showed up and was acting really nervous and had a "bunch of crack." Braun said he went with Shear to a friend's house, smoked some more crack, and passed out there. The next morning he heard from some unknown female that Chappell had been killed.

{¶ 22} Braun testified at trial. Among other things, he denied killing Chappell and asking his ex-girlfriend to provide an alibi for him and get rid of the gun. *Braun I*, ¶2-63.

C. Testimony from Hearing on Motion for New Trial

{¶ 23} Roy Fitzer testified at the hearing.[3] Fitzer said that on the evening of the murder, he called Chappell and arranged to meet him so that Chappell could buy a stolen car radio from him in exchange for drugs. When Chappell arrived at the meeting place and Fitzer showed him the radio, Chappell was upset and "cussed him out" because he believed Fitzer had just wasted his time to look at a worthless radio. Fitzer testified that he "sucker punched" Chappell twice, and then shot him once in the head and once in the mouth. All of this occurred while Chappell was still in his vehicle. Fitzer testified that he "panicked." He found a gas can in the trunk of the vehicle and "poured the gas all over," set Chappell on fire, and ran away.

{¶ 24} According to Fitzer, he lied to the police during their investigation of this case because the police were trying to "put it off on Braun," and Fitzer was interested in helping himself with his own legal problems. Fitzer testified that at the time Braun went to trial, he told the prosecutors and defense counsel that he had been lying and he wanted to testify, but they would not let him. He said he did not admit responsibility; he just said he knew Braun did not commit the murder. Fitzer also stated that he "never thought that [Braun] would be convicted, that is why I didn't say nothing. So I am thinkin' if he beat the case, I was free too. I never thought that he would be convicted of it."

{¶ 25} Braun assigns the following two assignments of error for our review:

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[3]At the time Fitzer testified, he was serving what amounted to a life sentence in prison. Further, he had exhausted all state appeals.

{¶ 26} "[I.] The trial court lacked jurisdiction to rule on Appellant's Crim.R. 33 motion for a new trial.

{¶ 27} "[II.] The trial court erred when it denied Appellant's Crim.R. 33 motion for a new trial."

II. Law and Analysis

A. Court's Jurisdiction

{¶ 28} In March 2008, Braun appealed his conviction and sentence. A year later, in March 2009, while this matter was pending before this court in *Braun I*, Braun filed a motion for a new trial. The trial court issued an entry stating that it declined to rule on the motion because it lacked jurisdiction while the matter was pending before this court.

{¶ 29} In April 2009, Braun filed a motion in this court seeking a stay of appellate proceedings pending resolution of his motion for a new trial. This court treated Braun's motion as a motion for a limited remand, and granted the motion. No trial court proceedings occurred on the limited remand, however, and in October 2009, this court affirmed the conviction, but reversed the sentence and remanded for resentencing. Braun was resentenced in December 2009. Also in December 2009, after resentencing Braun, the trial court set a hearing for January 2010 for Braun's motion for a new trial. On January 2, 2010, Braun appealed the resentencing judgment entry. *State v. Braun*, Cuyahoga App. No. 94467, 2011-Ohio-11 ("*Braun II*").

{¶ 30} The January hearing date for Braun's motion for a new trial was rescheduled, and the hearing was held on February 9, 2010. The trial court denied the motion for a new trial in May 2010.

{¶ 31} 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*, Cuyahoga App. Nos. 87660 and 88078, 2006-Ohio-6587, ¶11. This rule typically applies to bar trial court action on judgments that are pending on direct appeal. For example, this court has held that trial courts do not have 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, ¶104; *State v. Kenney*, Cuyahoga App. Nos. 81752 and 81879, 2003-Ohio-2046, ¶58.

{¶ 32} Braun's contention in this assignment of error is that the trial court did not have jurisdiction to consider his motion for a new trial because at the time it considered the motion, his appeal on his resentencing was still pending in *Braun II*. That appeal has since been resolved, and the sentence was affirmed. Id. at ¶6. Thus, Braun's concern that "if the trial court had ruled in [his] favor on his motion for a new trial, such an action 'would have resulted in a[n] usurpation of this court's jurisdiction since its action would have interfered with the

power and jurisdiction of the court of appeals to review and to affirm, modify, reverse or remand the case[,]'"[4] is moot. Further, no inconsistency as to the courts' rulings on the convictions was had — both the trial court and this court upheld the convictions. The state contends that if error did occur, Braun invited it. Although we do not find invited error,[5] we do note that Braun cannot have it both ways; that is, initiate proceedings and follow course without objection, and then challenge those same proceedings.

{¶ 33} In light of the above, the first assignment of error is overruled.

B. Denial of Braun's Motion for a New Trial

{¶ 34} A motion for a new trial is addressed to the sound discretion of the trial court and will be granted or denied as the justice of the case requires. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus. We will not reverse a lower court's refusal to grant a new trial unless there has been an abuse of that discretion and unless it appears that the matter asserted as a ground for a new trial materially affects the substantial rights of the defendant. Crim.R. 33. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

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[4]Braun quoting *State v. McGettrick* (1988), 40 Ohio App.3d 25, 33, 531 N.E.2d 775.

[5]Under the "invited error" doctrine, a party will not be permitted to take advantage of an error that the party invited or induced the trial court to make. *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, 646 N.E.2d 1115.

{¶ 35} Crim.R. 33(A)(6), governing motions for a new trial based upon newly discovered evidence, states:

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

{¶ 37} "* * *

{¶ 38} "(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *"

{¶ 39} Before a trial court may grant a motion for a new trial on the grounds that a witness has recanted his testimony, a trial court must determine whether the statements of the recanting witness are credible and true. *State v. Perez* (Sept. 27, 2000), Medina App. No. 3045-M; see, also, *State v. Pirman* (1994), 94 Ohio App.3d 203, 209, 640 N.E.2d 575. Newly discovered evidence recanting testimony is "looked upon with the utmost suspicion." *State v. Saban* (Mar. 18, 1999), Cuyahoga App. No. 73647; *State v. Germany* (Sept. 30, 1993), Cuyahoga App. No. 63568. The court is to ascertain the credibility of the witness. *State v. Curnutt* (1948), 84 Ohio App. 101, 110-111, 84 N.E.2d 230. Thus, a motion for a new trial that is based on recanted testimony is to be granted only when the court is reasonably satisfied that the trial testimony given by a material witness was false. *Saban*, supra, citing *Germany*, supra.

{¶ 40} The state's argument, both at the trial court level and here on appeal, is that Fitzer's testimony was not credible.

{¶ 41} Upon review, we find that Fitzer, either through his affidavit or testimony at the hearing on Braun's motion, did not provide credible evidence to warrant a new trial for Braun. Fitzer had nothing to lose by recanting his statement — he is serving what amounts to a life sentence and has exhausted his state appeals. Further, other evidence presented at Braun's trial did not support Fitzer's new claims. For example, cell phone records showing numerous calls from Shear to the victim on the day and evening of the murder were admitted into evidence at trial, which corroborated other trial testimony that Shear and Braun murdered Chappell.

{¶ 42} On this record, the trial court did not abuse its discretion by denying Braun's motion for a new trial.

{¶ 43} Accordingly, the second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR