[Cite as *Bedford v. Edwards*, 2011-Ohio-91.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94532

CITY OF BEDFORD

PLAINTIFF-APPELLEE

vs.

SHANA EDWARDS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Bedford Municipal Court
Case No. 09 CRB 01082

BEFORE: Stewart, J., Gallagher, P.J., and Kilbane, A.J.

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1,[1] the record from the Bedford Municipal Court, the briefs, and oral argument of counsel. For the reasons set forth below, we affirm.

{¶ 2} Defendant-appellant, Shana Edwards, her sister, and two juveniles were arrested on June 18, 2009 for shoplifting at the Bedford Wal-Mart. Appellant and her sister were charged with misdemeanor theft. Appellant's sister pled guilty and received an eight-day jail sentence.

[1]App.R. 11.1(E) states: "Determination and judgment on appeal. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form." See, also, Form 3, Appendix of Forms to the Rules of Appellate Procedure.

Appellant entered a plea of not guilty and was assigned counsel. On September 21, 2009, following a bench trial, appellant was found guilty and sentenced to a 30-day jail sentence. On October 5, 2009, appellant filed a motion for a new trial alleging the discovery of new evidence. On December 17, 2009, the trial court summarily denied appellant's motion. It is from that judgment that appellant filed this pro se appeal raising a single assignment of error.

{¶ 3} "The trial court abused its discretion when it denied the motion for a new trial without holding an evidentiary hearing."

{¶ 4} Appellant retained new counsel after her conviction and filed a motion for a new trial, arguing that new evidence had been discovered since trial that showed she was innocent of the crime. As "new evidence," appellant attached copies of the store's security reports; the Bedford police reports; select entries from the trial court's docket; a letter written by appellant's sister to the judge following trial; an affidavit from D.C.,[2] one of the juveniles involved in the shoplifting incident, stating that she did not receive a subpoena to testify at trial and if she had, she would have testified that it was appellant's sister, and not appellant, who was caught putting things in her purse; an affidavit from D.C.'s mother stating she did not receive or sign for a subpoena for her daughter; an affidavit from newly

[2]In keeping with this court's policy, juveniles are referred to by their initials.

retained counsel's paralegal detailing her investigation of the case and her interview of the store's witness; and a copy of a report from an expert retained by appellant to review the evidence in which he concluded that appellant was convicted based upon "inaccurate and inconsistent" reports and, in his opinion, there was reasonable doubt of appellant's guilt.

{¶ 5} Crim.R. 33 (A) sets forth grounds upon which a new trial may be granted and provides in pertinent part:

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

{¶ 7} "(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."

{¶ 8} To warrant a new trial, a criminal defendant must show that the newly discovered evidence 1) discloses a strong probability of changing the result if a new trial is granted; 2) has been discovered since the trial; 3) could not, with due diligence, have been discovered before the trial; 4) is material to the issues; 5) is not merely cumulative to former evidence; and 6) does not merely impeach or contradict prior evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370.

{¶ 9} A trial court's decision to grant or deny a motion for a new trial is not subject to reversal on appeal absent an abuse of discretion. *State v.*

Schiebel (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, syllabus. Likewise, as we noted in *State v. Stewart*, 8th Dist. No. 83428, 2004-Ohio-4073, whether a motion for a new trial warrants a hearing rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. An abuse of discretion exists where the trial court record demonstrates that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413, 575 N.E.2d 167; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 10} Appellant argues that the court should have conducted an evidentiary hearing to consider the new evidence submitted with her motion through affidavit testimony. Crim.R. 33(A)(6) provides that when a motion for a new trial is made upon the ground of newly discovered evidence, "the defendant must produce at the hearing on the motion * * * the affidavits of the witnesses by whom such evidence is expected to be given," and the state is permitted to "produce affidavits or other evidence to impeach the affidavits of such witnesses." While the language of the rule contemplates an evidentiary hearing to consider newly discovered evidence, such a hearing is discretionary and not mandatory. *Stewart* at ¶31; *State v. Martin*, 8th Dist. No. 87171, 2006-Ohio-4582; *State v. Gaines*, 1st Dist. No. C-090097, 2010-Ohio-895.

{¶ 11} In the instant case, appellant failed to present any "newly discovered evidence" as contemplated by Crim.R. 33. The store's security reports, the police reports, and even D.C.'s affidavit testimony were all available and could have, with due diligence, been discovered prior to trial. Additionally, D.C.'s affidavit testimony merely impeaches or contradicts the store's evidence. This is not sufficient to meet the requirement, under *Petro,* of a strong probability that the newly discovered evidence will result in a different verdict if a new trial is granted. *Petro*, 148 Ohio St. at 508.

{¶ 12} The fact that appellant had a subpoena issued for D.C., albeit at an incorrect address, demonstrates that appellant was aware of a potential alibi witness prior to trial. "Where a party is given reasonable cause to believe that favorable and available evidence exists, it is his duty, in the exercise of due diligence, to seek a continuance, if necessary, to investigate and to produce such evidence; a failure to do so will preclude the granting of a new trial on the basis of newly discovered evidence when it is recovered after the close of trial." *State v. Saxton*, 3rd Dist. No. 9-2000-88, 2002-Ohio-1024, citing, *Domanski v. Woda* (1937), 132 Ohio St. 208, 6 N.E.2d 601, paragraph four of the syllabus. Additionally, the record reflects that while the front of the praecipe lists D.C.'s address incorrectly, the return on the back shows that residence service was completed on the correct address.

{¶ 13} Because appellant failed to identify any new evidence within the contemplation of Crim.R. 33, that could not, with due diligence, have been discovered before trial, the trial court did not abuse its discretion when it denied appellant's motion for a new trial without conducting an evidentiary hearing.

{¶ 14} Appellant also makes allegations challenging the sufficiency of the state's evidence and the adequacy of her defense counsel's representation. However, we are unable to review these claims because appellant did not appeal her September 21, 2009 judgment of conviction, or provide a transcript of the trial proceedings for this court's review. Appellant's single assignment of error is overruled.

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 Bedford Municipal 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, P.J., and

MARY EILEEN KILBANE, A.J., CONCUR