

[Cite as *State v. Graff*, 2015-Ohio-1650.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102073

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**BRUNO GRAFF**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-98-361288-A

**BEFORE:** Blackmon, J., Jones, P.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** April 30, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Bruno Graff appeals the trial court's denial of his motion for leave to file a motion for a new trial, and assigns the following error for our review:

I. Appellant was denied his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Ohio Constitution, when the trial court committed an abuse of discretion by denying appellant's motion for leave for new trial.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶3} The facts of Graff's case have been sufficiently set forth in his direct appeal from the jury trial that culminated in his conviction, in *State v. Graff*, 8th Dist. Cuyahoga No. 74860, Ohio App. LEXIS 3159 (July 13, 2000), in the dismissal of his discretionary appeal in *State v. Graff*, 90 Ohio St.3d 1468, 738 N.E.2d 380, (2000), in his application for reopening of the direct appeal, in *State v. Graff*, 8th Dist. Cuyahoga No. 74860, Ohio App. LEXIS 2220 (May 8, 2001), in his petition for postconviction relief in *State v. Graff*, 8th Dist. Cuyahoga No. 74860, 2004-Ohio-1456, and again in the Ohio Supreme Court's denial of his appeal of our decision in his petition for postconviction relief in *State v. Graff*, 103 Ohio St.3d 1406, 2004-Ohio-3980, 812 N.E.2d 1288.

{¶4} After numerous unsuccessful attempts to overturn his conviction, on September 15, 2014, Graff filed a motion with the trial court pursuant to Crim.R. 33(B), a motion for leave to file a delayed motion for a new trial based on newly discovered evidence. In that motion, Graff claimed that at the trial he was unable to engage the

services of a forensic pathologist due to his lack of financial resources. Attached to the motion was a letter from Dr. Cyril Wecht, who had recently been retained by Graff's brother, to review the case. In the letter, Dr. Wecht states that it was his belief that the victim died as a result of an adverse reaction to heroin, not by a blow to the head.

{¶5} On September 19, 2014, the trial court denied Graff's motion. Graff now appeals.

### **Motion for Leave to File Motion for New Trial**

{¶6} In the sole assigned error, Graff argues the trial court erred when it denied his motion for leave to file a motion for a new trial.

{¶7} A motion for a new trial is addressed to the sound discretion of the trial court and will be granted or refused as the justice of the case requires. *State v. Glover*, 8th Dist. Cuyahoga No. 93623, 2010-Ohio-4112, citing *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). 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. *Id.*, citing *Sabo v. State*, 119 Ohio St. 231, 163 N.E. 28 (1928); *Long v. State*, 109 Ohio St. 77, 141 N.E. 691 (1923). 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*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶8} In addition, Crim.R. 33 provides, in relevant part, that a "new trial may be granted on a motion of the defendant \* \* \* [w]hen new evidence material to the defense is

discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.”

{¶9} Further,

[i]f it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Crim.R. 33(B).

{¶10} Therefore, in order to file a motion for a new trial based on newly discovered evidence beyond the one-hundred-and-twenty days prescribed in the above rule, a petitioner must first file a motion for leave, showing by “clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.” *State v. Wheat*, 8th Dist. Cuyahoga No. 93671, 2010-Ohio-4120, ¶ 22, quoting *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11. We will not overturn a trial court’s determination to deny leave to file a delayed motion for a new trial if competent, credible evidence supports that decision. *Id.* at ¶ 23.

{¶11} As previously noted, Graff moved for leave to file a delayed motion for a new trial based upon the newly discovered evidence of Dr. Wecht’s opinion that the victim’s death was not caused by a blow to her head, but instead by an adverse reaction to heroin. However, at trial, Graff presented the testimony of Dr. Mark Cohen, who testified that it would be very unusual for a blow to the top of the head to cause brain stem injury. Dr. Cohen specifically testified that he did not believe the blow in this case caused the victim’s death.

{¶12} Thus, Dr. Wecht’s opinion that the victim’s death was not caused by a blow to the head is not new evidence, per se, because this theory was already considered by the jury. As such, Dr. Wecht’s opinion is merely cumulative to what Graff’s defense team had previously presented. In our opinion, the only thing “newly discovered” is Graff’s awareness of this particular doctor.

{¶13} Further, despite Graff’s present day claim that he did have sufficient funds to retain a forensic expert, such as Dr. Wecht, we note, that in addition to having counsel appointed for his defense, the record indicates that expert fees were approved and granted for Graff’s defense.

{¶14} When a defendant prepares for trial, he and his attorney must research expert witnesses and make strategic decisions about which ones, if any, to have testify. A defendant’s failure to locate and call a particular expert witness does not provide grounds for a delayed motion for a new trial under Crim.R. 33 in the ordinary case. *State v. Thompson*, 2d Dist. Montgomery No. 25016, 2012-Ohio-4862. If the rules were otherwise, a convicted defendant perpetually could ferret out new expert witnesses to re-examine the evidence with the hope of obtaining a different result. *Id.*

{¶15} Based on the foregoing, the trial court did not abuse its discretion in denying Graff’s motion for a new trial. Accordingly, we overrule the sole assigned error.

{¶16} 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 be sent to said court 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.

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PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and  
MARY EILEEN KILBANE, J., CONCUR