

[Cite as *State v. Hill*, 2015-Ohio-1652.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102083

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONDELL L. HILL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-551296-A

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

RELEASED AND JOURNALIZED: April 30, 2015

APPELLANT

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Rondell Hill (“Hill”), appeals from the judgment of the trial court that denied his motion for leave to file a motion for a new trial. Having reviewed the record and the controlling case law, we find no abuse of discretion, so we affirm the judgment of the trial court.

{¶2} On June 20, 2011, Hill was indicted for one count of aggravated murder in violation of R.C. 2903.01(A) with firearm specifications in connection with the June 2, 2011 shooting death of Tyrone Spence (“Spence”). The matter proceeded to a jury trial on April 4, 2012. The state maintained that the shooting occurred after Spence was driven to Hill’s house by Damon Taylor (“Taylor”) in order to obtain money that Hill allegedly owed Spence, and that Hill shot Spence in the street after an argument. On April 5, 2012, Hill was convicted of the charge and the specifications, and he was sentenced to 30 years to life imprisonment plus three years on the firearm specification.

{¶3} On direct appeal, this court concluded that there was insufficient evidence to establish that Hill acted with prior calculation and design, and the court modified the conviction from aggravated murder to murder and remanded to the trial court for resentencing. *See State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, *discretionary appeal disallowed*, *State v. Hill*, 136 Ohio St.3d 1450, 2013-Ohio-3210. On September 19, 2013, the trial court resentenced Hill to a total of 18 years to life imprisonment. On October 13, 2013, Hill appealed from the resentencing hearing. This court affirmed. *State v. Hill*, 8th Dist. Cuyahoga No. 100536, 2014-Ohio-3416. Hill

also filed a motion to reopen his direct appeal, which was denied by this court. *See State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2014-Ohio-3409.

{¶4} On July 17, 2014, Hill filed a pro se motion for leave to file a motion for new trial. In support of this motion, Hill maintained that he had recently obtained newly discovered exculpatory eyewitness evidence from Myles McCollum (“McCollum”) that the state of Ohio failed to provide to him at trial. Hill presented an affidavit from McCollum who averred:

2. I [McCollum] talk[ed] with [Hill] about the shootings that occurred on Cory Ave. in 2011.

3. I [McCollum] told Rondell Hill about me making a statement to police after the first shooting [on] May 30, 2011 and another for the second shooting [June 2, 2011,] after I was arrested for a warrant that I had.

4. I [McCollum] was questioned about the shootings that occurred on Cory Ave., and I did give information about both shootings.

5. In 2012[,] I [McCollum] was brought from Richland Correctional to testify as a witness to the information given in this affidavit.

6. I [McCollum] when questioned said [that on] June 2, 2011, [Hill] was at the scene when that shooting occurred but not with any weapon.

7. I [McCollum] when questioned said [that on] June 2, 2011, I was at home when I saw [Hill] run pas[t] my home while 3 to 4 gunshots were being fired.

{¶5} In opposition, the state maintained that Hill was not prevented from discovering evidence offered by McCollum. The state noted that McCollum was issued a subpoena to appear at Hill’s trial, and a transport order was filed to authorize the

Cuyahoga County Sheriff to transport him to Hill's trial. The state further noted that McCollum was mentioned during the voir dire at page 133-135, and that this information was provided in discovery. The state further maintained that this information is cumulative to Hill's own statement to police that he ran when an unknown tattooed gunman began shooting, and he eventually ran past his friend's home as the shots rang out. The trial court denied Hill's motion without a hearing on September 25, 2014.

{¶6} Hill now appeals, assigning two errors for our review.

Assignment of Error 1

The trial court erred in denying appellant motion for leave to file motion for new trial Crim.R. 33(B) 33 (A)(6) when appellant showed that his due process rights were violated, the affidavit supported his claim.

Assignment of Error 2

The trial court abused its discretion when the court denied appellant's motion for leave without an evidentiary hearing which violated his 14th Amendment under the United States Constitution.

Motion for Leave to File New Trial Motion

{¶7} Within Hill's first assignment of error, he asserts that the prosecuting attorney "knowingly withheld evidence and used false and misleading evidence and/or false and misleading testimony to obtain defendant's conviction," and that he was unavoidably prevented from obtaining the exculpatory statement of witness McCollum.

{¶8} We review a trial court's ruling on a Crim.R. 33 motion for an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus; *State v. Walden*, 19 Ohio App.3d 141, 483 N.E.2d 859 (10th Dist.1984).

{¶9} Crim.R. 33 states, in relevant part:

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(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. 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, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

* * *

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty (120) days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If 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 the discovery of the evidence within the one hundred twenty (120) day period.

{¶10} In order to be able to file a motion for a new trial based on newly discovered evidence beyond the 120 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. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 15-16 (2d Dist.). *See also* R.C. 2945.80. A party is unavoidably prevented from filing a motion for 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. *Parker; Walden* at 145-146.

{¶11} In this matter, Hill maintains that the prosecuting attorney knowingly withheld exculpatory testimony from McCollum that indicated McCollum observed Hill running past his house while the shots were already being fired. In opposition, the state maintained that McCollum's name was listed in discovery provided by the state in July 2011. In addition, McCollum was subpoenaed to appear at trial, and an order of transport was issued for his presence at trial. During voir dire, McCollum's name was also mentioned as a potential witness. Moreover, in Hill's statement to police, he maintained that he fled past the home of his friend after the shooting had started.

{¶12} The record, therefore, fails to establish that Hill lacked knowledge of McCollum's contentions, and it fails to support Hill's claim that he had no knowledge of this evidence or could not discover it with reasonable diligence. There is no basis upon which to conclude that Hill was unavoidably prevented from moving for a new trial within 120 days of the April 5, 2012 verdict.

{¶13} Accordingly, we conclude that the trial court did not abuse its discretion in denying Hill's motion for leave to file a motion for a new trial.

{¶14} The first assignment of error is without merit.

Failure to Hold a Hearing

{¶15} Hill next complains that the trial court erred in failing to hold a hearing in this matter.

{¶16} The decision whether to grant or hold an evidentiary hearing on a defendant's request for leave to file a delayed motion for new trial falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶ 19 (2d Dist.).

{¶17} To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence

it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of 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 the former evidence.

State v. Barnes, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶18} We find no abuse of discretion in connection with the trial court's failure to hold a hearing. Hill failed to demonstrate that McCollum's statement was "newly discovered" evidence. In any event, the information concerning Hill running past McCollum's home while the shots rang out was cumulative of Hill's own contentions and does not create a reasonable probability that the result of a new trial would be different.

{¶19} The second assignment of error is without merit.

{¶20} Judgment is 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.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
PATRICIA A. BLACKMON, J., CONCUR