

[Cite as *Parma v. Palmer*, 2015-Ohio-1830.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101737

CITY OF PARMA

PLAINTIFF-APPELLEE

vs.

ROBERTA PALMER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Parma Municipal Court
Case No. 13 TRD 18732

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

RELEASED AND JOURNALIZED: May 14, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, Roberta Palmer, appeals the trial court’s denial of her motion for a new trial. We affirm.

{¶2} On November 6, 2013, Palmer was issued a traffic citation for failure to yield. The ticket was signed by Parma Police Sergeant Ken Gillissie. The matter proceeded to a bench trial on January 27, 2014, at which Sergeant Gillissie and Patrolman Michael Tellings testified for the city. Palmer testified in her own defense. The trial court found Palmer guilty and ordered her to pay a \$75 fine, suspended \$50 of the fine, and court costs.

{¶3} On May 27, 2014, Palmer filed a motion for a new trial, alleging she had evidence that the testifying police officers perjured themselves during trial. The city objected and the trial court denied the motion without hearing.

{¶4} It is from this decision that Palmer appeals, raising two assignments of error, which will be combined for our review:

I. The trial court violated appellant’s due process rights under Section 16, Article 1 of the Ohio Constitution and the Fourteenth Amendment to the U.S. Constitution by denying appellant’s “Motion for New Trial” based upon the false testimony of appellee’s two witnesses.

II. The trial court’s denial of appellant’s “Motion for New Trial” was against the manifest weight of the evidence.

{¶5} In her two assignments of error, Palmer argues that the trial court erred in denying her motion for a new trial.

{¶6} The decision whether to grant a motion for a new trial on the basis of newly

discovered evidence is committed to the sound discretion of the trial court. *State v. Peters*, 8th Dist. Cuyahoga No. 87959, 2007-Ohio-1285, ¶ 30, citing *State v. Matthews*, 81 Ohio St.3d 375, 691 N.E.2d 1041 (1998). We will not reverse a trial court’s denial of a motion for a new trial absent an abuse of that discretion. *Peters at id.*, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). An abuse of discretion is more than a mere error in judgment, it implies that a court’s ruling is unreasonable, arbitrary, or unconscionable. *Peters at id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶7} Palmer filed her motion for a new trial pursuant to Crim.R. 33(A)(2), which provides that “[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his [or her] substantial rights * * * [m]isconduct of the jury, prosecuting attorney, or the witnesses for the state * * * .”

{¶8} Palmer has not asserted that her motion was pursuant to Crim.R. 33(A)(6), on the grounds of newly discovered evidence. The distinction is critical because Crim.R. 33 (B) provides that a motion for a new trial:

shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or, in a bench trial, fourteen days after the court makes its decision, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his [or her] motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

{¶9} Although Palmer claims that her motion for a new trial was not untimely because her evidence was newly discovered, her motion for a new trial was pursuant to

Crim.R. 33(A)(2) and based on the alleged misconduct of the state's witnesses. Palmer did not file a motion for leave to file a delayed motion for a new trial nor request the trial court to find that she was unavoidably prevented from filing her motion within the time provided by Crim.R. 33(B). Palmer had 14 days after the trial court's decision finding her guilty to file her motion. Because she filed her motion for a new trial outside that 14-day-time limit prescribed by the rule, the motion was untimely and the trial court did not abuse its discretion in denying her motion.

{¶10} In addition, Palmer's motion does not comport with Crim.R. 33(C), which provides that "[t]he causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit." "Where a defendant fails to produce supporting affidavits as required by Crim.R. 33(C), the trial court does not abuse its discretion in denying the motion for new trial." *State v. Lacy*, 6th Dist. Huron No. H-12-011, 2013-Ohio-842, ¶ 16, citing *Toledo v. Stuart*, 11 Ohio App.3d 292, 293, 465 N.E.2d 474 (6th Dist.1983). In *Lacy*, the defendant-appellant moved for a new trial pursuant to Crim.R. 33(A)(2) based on an allegation that the prosecutor in the case was overheard telling someone that the defendant would be found guilty within close proximity of potential jurors. But the defendant failed to submit an affidavit in support of his Crim.R. 33(A)(2) motion for a new trial. The *Lacy* court held that the trial court did not abuse its discretion when it denied the defendant's motion for new trial on the basis of Crim.R. 33(A)(2) based, in part, on his failure to comply with Crim.R. 33(C). *Lacy at id.*

{¶11} Here, Palmer did not submit an affidavit in support of her Crim.R. 33(A)(2) motion for a new trial. Thus, her motion for a new trial did not comport with the substantive requirements of Crim.R. 33(C) and the trial court did not abuse its discretion in denying it.

{¶12} Although it is unnecessary for this court to address the merits of the motion due to its procedural and substantive deficiencies, we nevertheless find that the denial was proper because there was insufficient evidence to warrant a new trial.

{¶13} According to Palmer, after trial, she made a public records request that uncovered information showing that the two police officers were not in the same zone car when she was pulled over, even though they testified to the contrary and that they both witnessed her traffic violation. According to the information Palmer gathered and exhibits attached to her motion for a new trial, Sergeant Gillissie was in car C10 and Patrolman Tellings was in car 333 between 3 and 11 p.m. on the day her ticket was issued. Palmer's ticket was issued at 6:50 p.m. Between 5 and 7 p.m. Sergeant Gillissie issued seven traffic citations and four traffic warnings; Patrolman Tellings issued eight tickets and four warnings. None of the tickets were signed by both officers, which Palmer argued was indicative of the officers being in separate zone cars. Palmer further argued that the times and locations the different traffic tickets were issued show that it would be impossible for the officers to have shared a patrol car. Instead, Palmer alleged, the officers "enhanced the facts to secure [Palmer's] conviction through testifying falsely under oath."

{¶14} Based on our review of the evidence, we do not find that the trial court abused its discretion in denying Palmer’s motion for a new trial. Contrary to Palmer’s assertion that her exhibits evidence witness misconduct, the exhibits show that while the officers were assigned to two different zone cars on the day of the incident, they were both in zone car 100 from 1700 to 2000 hours (5:00 p.m. to 8:00 p.m.) when they issued a total of 15 tickets, including Palmer’s, and 8 warnings.

{¶15} The officers testified that they were working a special detail at the intersection of Broadview and Brookpark Roads in Parma, patrolling for red light and failure-to-yield violators, because the intersection was a high accident, high violation time during rush hour. Sergeant Gillissie testified that he was working a detail known as “TOP,” which stands for Targeted Oriented Patrolling, “in cruiser 100 with Patrolman Tellings, we were watching intersection both for red lights, improper turns and fail to yield,” and it was during this time they pulled Palmer over for failing to yield to opposing traffic.

{¶16} Moreover, although Palmer asks us to believe that it is impossible for two police officers to issue 15 traffic tickets and 8 warnings in a two-hour time period and requests this court rely on her interpretation of driving distances in Parma based on the addresses written on the citations she submitted as exhibits to her motion for a new trial, it is not within the province of this court to conduct a de novo review of the evidence. Nor would it be prudent for this court to attempt, as Palmer would have us do, to determine distance, take measurements, or estimate driving time, when the trial court,

which is based in the jurisdiction where the ticket was issued, was in the best position to review the evidence submitted with the motion for a new trial.

{¶17} In light of the above, the trial court did not abuse its discretion in denying Palmer's motion for a new trial. The assignments of error are overruled.

{¶18} 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 Parma 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.

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
PATRICIA ANN BLACKMON, J., CONCUR