[Cite as *State v. West*, 2015-Ohio-3354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102587 and 102613

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY WEST

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-548609-B

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 20, 2015

FOR APPELLANT

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Timothy West appeals the denial of his motions for leave to file a delayed motion for new trial in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

{¶2} The facts of West's case have been previously stated by this court during his direct, consolidated appeals, *State v. West*, 8th Dist. Cuyahoga Nos. 97391 and 97900, 2013-Ohio-96, as follows:

> In September 2010, the Cleveland police began investigating Timothy and Todd [West]. During the investigation, the police learned that the brothers owned the property located at 2341 Scranton Road, and that they had purchased the property for $110,000 cash in May 2010. The police also learned that each man owned a home in Westlake.
>
> The trial testimony revealed that there is a short driveway for the Scranton Road property that leads to a locked gate and chain link fence. A large commercial building is located inside the gated and fenced portion of the property. On November 3, 2010, Cleveland police conducted surveillance of the property. During the surveillance, the police observed a van, driven by Timothy, arrive at the property, followed shortly by the arrival of an Oldsmobile, driven by Todd. Upon their arrivals, each defendant drove his vehicle into the driveway, got out of his vehicle, unlocked the padlock, and opened the gate. The defendants then got back into their vehicles, drove

beyond the gate, then got out of their car again and closed and locked the gate. Todd and Timothy then drove their vehicles to the garage bay doors, opened the garage doors, pulled their cars into the garage, and then closed the door.

After Timothy and Todd left the property that day, the police walked the perimeter of the building and smelled a strong odor of marijuana. The police obtained a warrant to search the building; they also obtained warrants to search Timothy and Todd's homes.

On the day of the searches, November 5, 2010, the officer who had surveilled the Scranton Road property two days earlier again conducted surveillance of the property. The officer saw the same two vehicles from the November 3 surveillance arrive at the property separately, but very close in time, and again driven by Todd and Timothy. Todd arrived first driving the Oldsmobile. He went through the same motions as on November 3: stopped the car in the driveway, got out and unlocked the gate, got back into the car and drove past the gates, got out, closed and locked the gate, drove the car to the garage, opened the garage, drove in, and shut the garage door. Timothy arrived shortly after Todd, and went through the same motions from November 3 and that Todd had just gone through moments before.

During the officer's surveillance of the property, no other vehicles or persons arrived. Eventually, Todd left the building and after seeing Todd

drive the Oldsmobile out of the garage, the officer contacted other officers to move in. Todd was detained when he got out of his car to unlock the gate. The police informed Todd that they were there to execute a search warrant and informed him of his Miranda rights, which Todd indicated he understood.

An officer stayed outside the building with Todd while other law enforcement officials executed the search inside the building. The officer asked Todd if there was any marijuana inside the building; Todd responded "lots." Todd elaborated that there were "a lot, hundreds, maybe a thousand" marijuana plants in the building. When the police asked him how many plants were ready for harvest, Todd responded, "lots, you got us good." When further asked where he kept his money, Todd replied "we haven't had a chance to sell anything yet, there is no money."

Meanwhile, the officers executing the search found the main door to the building was padlocked, as was the basement door. The officers who searched the basement had to wear face masks because the odor of marijuana was so overwhelming. Timothy was found coming from an office area in the warehouse [that was connected to rooms containing marijuana plants and growing paraphernalia].

The police recovered hundreds of marijuana plants growing primarily in the basement and in one or two of the first floor rooms. The plants weighed a

total of approximately 55,000 grams. The police also recovered numerous criminal tools, including “grow lights,” ventilation systems, soil, chemicals, packaging material, plant stakes, plastic gallon-sized and sandwich-sized bags, and scales.

A gallon-sized plastic bag containing marijuana was recovered from the trunk of Todd’s vehicle. When asked by the police if the bag of marijuana was a pound, Todd said it was 170 grams. A forensic scientist from the Cuyahoga County Regional Forensic Science Laboratory testified that the weight of the bag and contents was 173.5 grams.

The police recovered $280 from Timothy’s person and an electric timer was found during a search of his van. Papers and money were seized from Timothy and Todd’s homes: $1,313 from Timothy’s house, and $2,700 from Todd’s house.

After Todd and Timothy had been together for about an hour, Todd denied talking to the police and making any statements. Todd admitted that he owned the building and stated that he leased part of it to a man named Adam Flanik.

* * *

Additionally, the trial testimony revealed that Timothy did HV/AC work. Timothy testified that he began renting the south side of the building, where the marijuana-grow operation was discovered, to a couple named Eddie and Maria Torres in July 2010. He stated that although he smelled marijuana on occasion, he thought someone was smoking it inside the building. He further testified that Maria Torres was a florist and was going to plant some

> trees for him, so he picked up soil for her. He denied any knowledge of the marijuana and maintained that he and Todd were there to pick up the November rent.

Id. at ¶ 3, quoting *State v. West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2012-Ohio-6138.

{¶3} West was convicted of illegal manufacture of drugs or cultivation of marijuana, drug trafficking, drug possession and possession of criminal tools. On appeal, this court affirmed West's convictions but reversed his sentences for drug trafficking and manufacture of drugs finding them to be allied offenses of similar import. *Id*. at ¶ 46. This court also reversed a forfeiture order relating to funds seized from West's home.

{¶4} On remand, the state elected for West to be resentenced on the drug trafficking charge and the trial court imposed an eight-year prison term on that count. West's convictions for manufacture of drugs and drug possession were merged with his drug trafficking offense as allied offenses. The trial court also imposed a 12-month prison term on West's conviction for possessing criminal tools but ordered his sentences to be served concurrently.

{¶5} On October 23, 2014, West filed a motion for leave to file a delayed motion for new trial. He filed a second motion for leave to file a delayed motion for new trial on December 29, 2014. The trial court denied West's motions on January 15, 2015 and January 23, 2015 respectively.

{¶6} In his sole assignment of error, West argues that the trial court abused its

discretion when it denied his motions for leave to file a delayed motion for new trial based on his claim of newly discovered evidence.

{¶7} A Crim.R. 33 motion for a new trial is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 77, 564 N.E.2d 54 (1990). An abuse of discretion implies the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1993).

{¶8} To warrant the granting of a motion for a new trial in a criminal case, based on the grounds 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.

{¶9} Crim.R. 33 does not require a hearing on the motion for a new trial in every instance. *State v. Sailor*, 8th Dist. Cuyahoga No. 100009, 2014-Ohio-1062, ¶ 16. To warrant a hearing, the newly discovered evidence must present a strong possibility that a new trial might reach a different result. *Id.*

{¶10} West argues that there was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the trial court erred in denying his motion for a new trial. Pursuant to *Brady*, the prosecutor is required to disclose exculpatory and

impeachment evidence that is material to guilt. *Brady* at 87. Evidence favorable to the defendant is deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Bagley* at 669; *see also State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph five of the syllabus. The Supreme Court of Ohio cautioned that in order to find the undisclosed evidence material, the omission must "reflect our overriding concern in the justice of the finding of guilty," which means "the omission must be evaluated in the context of the entire record," and, if "there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *State v. Jackson*, 57 Ohio St.3d 29, 34, 565 N.E.2d 549 (1991), quoting *United States v. Agurs*, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

{¶11} West alleges that the lead detective on the case, Cleveland police Detective Joseph Bovenzi lied at trial when he testified that the police investigated Adam Flanik pursuant to West's allegations and "[n]othing we found led us to believe that he was involved in this." West takes issue with Bovenzi's testimony that "we found nothing to indicate that [Flanik] was involved in this crime, or any other crime, to sum it up."

{¶12} West argues that an affidavit by special agent in charge Jeffrey Capretto of the Westshore Enforcement Bureau establishes that Detective Bovenzi and Cleveland police Detective Scott Moran lied at West's trial. Capretto's affidavit, dated February

25, 2012 states that Capretto was informed by Detective Moran in March 2011 that a source provided information that Flanik was growing marijuana in his residence in Bay Village. A trash pull from Flanik's residence revealed an empty Folger's coffee can containing marijuana residue. In January 2012 an anonymous complaint received by Capretto alleged that marijuana was being grown at Flanik's residence.

{¶13} Subsequent investigation led Capretto to seek a warrant for the search of Flanik's residence that was executed on February 28, 2012. West attached to his motion the docket in CR-12-563216-A wherein Adam Flanik plead guilty to illegal manufacture or cultivation of marijuana. The date of the offense listed on the docket was February 28, 2012.

{¶14} We cannot say that the evidence presented by West would have been material to his guilt or innocence in this case. To begin, the most glaring problem with West's motion is that none of the evidence offered by West connects Flanik in any way to West's November 5, 2010 offenses at the warehouse at 2341 Scranton Road. Although Flanik was convicted of a separate unrelated drug offense in 2012, there is no indication that Detectives Bovenzi and Moran lied at trial regarding their fruitless investigation into Flanik's involvement in West's case during 2010. West focuses on the fact that Detective Moran testified at West's trial that the name Flanik was not familiar to him. However, there is nothing in the record to suggest that at the time of West's offense in November 2010, when he provided the name of Adam Flanik to Moran, that Moran was familiar with Flanik. Thus, West has not established that Moran was untruthful in his

testimony. At best, the record indicates that Detective Moran was informed by an unnamed source in March 2011 that Flanik was growing marijuana in his residence in Bay Village. Without any temporal or physical connection to West's November 2010 offenses, this information is irrelevant to this case.

{¶15} In this instance, the alleged newly discovered evidence cannot be said to be material to West's guilt or innocence. Therefore, the trial court was justified in summarily denying West's motions for a new trial. *State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468.

{¶16} West's sole assignment of error is overruled.

{¶17} The judgment of the trial court is affirmed.

It is ordered that the 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
EILEEN T. GALLAGHER, J., CONCUR