[Cite as *State v. Conner*, 2016-Ohio-301.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103092

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY T. CONNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-566159-A

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 28, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Anthony Conner, appeals from the trial court's judgment denying his motion for a new trial without a hearing. Conner's motion was based on his claim of newly discovered evidence regarding the death of Damon Woodard under Crim.R. 33(A)(6). Conner raises one assignment of error for our review:

> Defendant was denied due process of law when he presented evidence of actual innocence without an evidentiary hearing.

{¶2} Finding no merit to his appeal, we affirm the judgment of the trial court.

I. Conner Convicted

{¶3} In January 2013, Conner was convicted of aggravated murder, murder, and felonious assault for the death of Woodard. He was also convicted of discharging a firearm on or near prohibited premises and having a weapon while under a disability.

{¶4} On the night of August 20, 2012, police officers arrived at Sirrah House nightclub. A fight had broken out at the club; there were "at least a hundred" people who were "all over the place." *State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601, ¶ 7. Officer Nikolai Przybylski testified that once the crowd began to clear, he observed a black male "wearing jeans and a long-sleeved red plaid shirt" standing over another black male who was lying on the ground. *Id.* Officer Przybylski recalled thinking that it was "strange" that someone would be wearing a long-sleeved shirt in the middle of summer. *Id.*

{¶5} Officer Przybylski said that despite approximately "a dozen people meandering" between his car and the male in the red plaid shirt, he could see the male

pull a gun out of the waistband of his pants and start shooting in the direction of the officers. *Id.* at ¶ 8. Officer Przybylski had "an unobstructed view" of the male in the red plaid shirt. Officer Przybylski stated that the area was "well lit and he was able to see the shooter's face and identify the gun as a .45-caliber 'two-tone[d] black and chrome or black and silver' handgun." *Id*. Officer Przybylski then saw the male in the red plaid shirt turn to his right and fire his gun three to four more times. Officer Przybylski began to run toward the shooter, and began chasing him. *Id.* at ¶ 9. At one point, Officer Przybylski saw the shooter "crouch down" near a "dark-colored car" and "almost immediately pop back up." *Id.* Officer Przybylski continued to chase the shooter on foot. Officer Curtis joined in the chase. They eventually caught the male in the red plaid shirt; the male was later identified as Conner. Conner did not have a gun on his person, but a gun was found by other officers that matched the description of the gun that Officer Przybylski saw Conner shooting.

{¶6} Officers Daniel Dickens and Sarene Saffo heard gunshots shortly after arriving at the scene. Both officers observed the male in the red long-sleeved shirt shooting a gun. They also joined in the chase, saw the shooter running between cars, duck down briefly between cars and pop back up, and then take off southbound out of the parking lot. After the shooter was arrested, Officers Dickens and Saffo returned to the parking lot where they last saw the shooter with the gun. They found a black and silver handgun between the cars where they had seen the shooter duck down and pop back up. The gun was a .45-caliber Kimber semiautomatic.

{¶7} Officers found the victim, Damon Woodard, after the second round of shots had been fired. The victim had been shot in the chest, arm, and knee. Doctors recovered a bullet from the victim's knee.

{¶8} Police found six spent shell casings at the scene. The six spent shell casings, as well as the bullet recovered from the victim's knee, all came from the .45 semiautomatic handgun found at the scene.

{¶9} There were no fingerprints on the gun. Conner's hands and shirt tested negative for gunshot residue.

{¶10} Another witness for the state, Marquis Hollowell, also identified Conner as the shooter while Conner was in a police car in the parking lot. Subsequently, during a police investigatory interview, a detective showed Hollowell a single photograph of Conner, and Hollowell reaffirmed his identification of Conner as the shooter. At trial, however, Hollowell testified that he could not remember anything from that night. The trial court allowed the state to play the entire video recording of the detective's interview with Hollowell, including his identification of Conner from the single photograph, to impeach or to refresh his memory. Hollowell insisted that he still could not remember anything. Thus, Hollowell never identified Conner as the shooter for purposes of trial evidence. Conner's trial counsel moved for a mistrial because of the prejudicial nature of video recording. The trial judge denied the motion and instructed the jury that "[t]he videotaped interview of Marquis Hollowell is not to be considered as substantive evidence but only for impeachment purposes." *Id.* at ¶ 46.

{¶11} The jury convicted Conner of aggravated murder, murder, and felonious assault for the death of Woodard. The jury also convicted Conner of shooting a firearm on or near prohibited places and having a weapon while under a disability. The trial court sentenced Conner to life in prison with the possibility of parole after 30 years, three years on the firearm specification to be served consecutive to and prior to the base charge of aggravated murder. The court also sentenced Conner to eight years in prison, plus three years for a firearm specification for discharging a firearm on or near prohibited premises; and 36 months in prison for having a weapon while under a disability. The sentences for discharging a firearm on or near prohibited premises and having a weapon while under a disability were to be served concurrent to each other and concurrent to the sentence for aggravated murder.

II. Convictions Affirmed

{¶12} Conner raised six arguments on appeal: (1) the trial court erred when it denied his motion for a mistrial, (2) the trial court erred when it found Hollowell competent to testify, (3) the prosecutor made improper comments during closing arguments and his counsel was ineffective for failing to object to the improper comments, (4) his convictions were not supported by sufficient evidence, (5) his convictions were against the manifest weight of the evidence, and (6) the trial court erred by failing to merge allied offenses of similar import. This court overruled all of his assignments of error and affirmed the trial court's judgment. *See id.* The Supreme Court of Ohio declined to accept jurisdiction. *State v. Conner*, 139 Ohio St.3d 1419, 2014-Ohio-2487,

10 N.E.3d 739.

III. Application to Reopen Appeal Denied

{¶13} In May 2014, Conner filed an application to reopen his appeal. In it, he argued that his appellate counsel was ineffective for failing to argue that (1) the trial court erred in failing to suppress a suggestive pretrial identification, and (2) the prosecutor used perjured evidence and an improper argument to secure the conviction. *State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-4669, ¶ 1. This court denied his application, finding "overwhelming evidence that Conner killed Woodard." *Id.* at ¶ 12. The Supreme Court of Ohio also declined to accept jurisdiction over this denial. *State v. Conner*, 141 Ohio St.3d 1476, 2015-Ohio-554, 25 N.E.3d 1082.

IV. New Witnesses Come Forward; Motion for Leave to File a Motion for New Trial

{¶14} In January 2015, Conner moved for leave to file a motion for a new trial, asserting newly discovered evidence and attaching a single affidavit to his motion. Conner also moved to supplement his motion with two more affidavits, which the trial court granted.

{¶15} In his motion for leave to file a motion for a new trial, Conner attached the affidavit of Dillen Alston. Alston averred the following:[1]

> On August 20 , 2012 I was in the parking lot when the club let out do to the fact they said I was too young to get in the club. So I stayed in the car talking to a few women waiting to go inside the club. Also, I was waiting

[1]The affidavits of Dillen Alston, Anthony Wooten, and Muhammad Grant are typed as quoted. No spelling or grammatical errors have been corrected.

on a friend to arrive when I saw a police car in the driveway of the "Sirrah House." That's when I seen a group of males arguing and a cop pulled his car up and parked in the middle of the street. A fight started in the parking lot and everyone started leaving the club to watch the fight. I witnessed a light skinned male in white clothes using a gun to slap another with while some of the other guys repeatedly kicked another while he layed on the floor defenseless. I was sure the police was going to arrest these guys but they stayed in their cars. So as I looked for my friend Mohomad I found him moments later then instantly shots were fired it was three to four shots at first. Next I see the same light skinned male in white run past us with a gun in his hand and blood all over his shirt and pants. That's when I seen the cops firing at Mr. Conner as he was running pass without a gun or anything. Then I saw a black cop arrest the light skinned male in white with the gun. So I'm thinking they got the right man and I left with my friend. I had no clue Mr. Conner was even arrested until he was in trial. Mr. Conner never had a gun and he was not fighting in the crowd. I'm not afraid to speak and testify to the truth and I hope others will speak the truth also.

{¶16} In his motion to supplement, Conner submitted two more affidavits, that of Anthony Wooten, Jr. and Muhammad Grant. Wooten averred the following:

1. I am a resident of Cleveland, Ohio.

2. On the date of August 20, 2012, I was present at the Sirrah House and did witness the events that unfolded.

3. I know of the defendant, Anthony Conner, only through mutual acquaintances, and seeing him in passing.

4. Upon being informed, by my brother, [Antwan Wooten] that Mr. Conners was being accused of the shooting at the Sirrah House, and that my brother was intending to offer a statement to Ms. Conner, I volunteered to do the same.

5. Together, with my brother, I contacted Ms. Conner, Anthony Conner's mom.

6. If there are any questions, involving my statement, I can be contacted at this number: * * * .

7. On the night of August 20, 2012, previous to the incident, my brother and

I noticed Anthony Conner partying in the Sirrah House.

8. My brother and I entertained a conversation, about how nicely Mr. Conner always dressed.

9. Later that night, my brother and I was leaving the Sirrah House and about to head home.

10. I recall there being police officers instructing the people to keep moving, because a crowd had gathered in one area.

11. It turned out that the crowd had gathered because of a fight that had broken out.

12. As we were approaching the parking lot, where our car was, we heard gunshots.

13. My brother and I, both, took cover, to avoid being hit by any stray bullets.

14. At some point, my brother peeked his head up, to see what was going on.

15. Comments were made, between us, about their shooting while the police was right there in the area.

16. My brother, Antwan Wooten, was describing the scene to me, when a burst of gunshots began hitting the truck we were hidden behind.

17. We sat still, momentarily, then peeked out, to make sure we were not about to be run up on, being the shots appeared to be intended for us.

18. Peeking out, my brother announced to me that he was seeing a light-skinned guy, wearing white, with a gun in his hand.

19. I took a look, at that time, and noticed the same guy, appearing to be looking for someone.

20. The guy we saw, and some others we couldn’t see, went on just shooting either at each other or someone else.

21. Fearful for our lives, my brother and I remained hidden.

22. Police officers also instructed everyone to “Stay down!,” which we did.

23. Shortly after, the shots went silent, and everyone ran their separate ways, trying to get away from it all.

24. As we got up and were going toward our car, my brother pointed out to me the police, who were then chasing and shooting at Anthony Conner.

25. We wondered what that was about, because we thought it strange that they were actually shooting at him, when it was obvious that he was not armed or carrying any sort of weapon.

26. We heard other gunshots and observed another black male when he fell to the ground, obviously having been struck by a bullet.

27. We wasted no more time, after that. We got in our car and got away from there.

28. A year and a half, maybe two, my brother, Antwan Wooten, told me about a rally that was formed, protesting Mr. Conner’s imprisonment for the shootings that took place on Aug. 20, 2012, and my brother’s intentions to contact Mr. Conner’s family with his eyewitness statement.

29. My brother and I discussed the fact that we knew that Mr. Conner was in no way the shooter, that day, and thus decided we would both go and offer our statements, as witnesses of the fact.

30. It is my statement that, having observed Mr. Conner’s at the Sirrah House, on August 20, 2012, he was not in possession of any weapon and did not have any involvement with the shootings that are in question.

{¶17} Grant averred the following:

I was present at the Sirrah House on August 20, 2012. I drove up their with Dillen Alston and he could not enter the club because of his age so he waited in the car while I went inside. Several fights began to occur just inside of the club but it’s common and the security guards kicked the males out who were fighting. Next I see Mr. Conner in the club after the fight with a group of women dancing all around him. He was wearing a red plaid shirt and blue jeans I could not say that other people wore the exact same shirt but similar but his stood out cause others were looking like

> twins. I laughed to myself saying everybody caught the sale at Dillards. Moment's later the club let's out it was a lot of comotion going on outside so I started looking for Dillen because he had the car key's. Suddenly everybody just ran across the street to the parking lot. I'm thinking I'm going to find Dillen over their which I did and I witnessed a group of males fighting. I watched to make sure Dillen wasn't involed which he wasn't. So I proceeded to look around in the parking lot then I found Dillen then I heard gun shots. I can't remember how many then I saw a light skinned male very short with white on run pass me and Dillen with a gun in his hand and blood on his clothes. Then more shot's maybe two or three then people started ducking. When the shot's stoped we stood up and witnessed Mr. Conner run pass us without a gun. A cop was shooting at him and chasing him I never seen Mr. Conner with a gun the same light skinned male that I saw earlier that night with a gun the cops arrested him so Dillen and I left.

{¶18} The trial court denied Conner's request for leave to file a motion for a new trial without an evidentiary hearing. It is from this judgment that Conner appeals.

V. Crim.R. 33

{¶19} Conner argues that he was denied due process of law when he presented evidence of "actual innocence" in his Crim.R. 33 leave to file a motion for a new trial based on newly discovered evidence. Crim.R. 33, however, does not contemplate a motion for a new trial on grounds of evidence demonstrating "actual innocence" apart from the grounds set forth in Crim.R. 33(A)(6), so a motion based on the premise must demonstrate the strong probability that newly discovered evidence would have led to a verdict of not guilty. *State v. Jalowiec*, 9th Dist. Lorain No. 14CA010548, 2015-Ohio-5042, ¶ 30.

{¶20} Crim.R. 33(A)(6) provides that"[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights":

> 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.

{¶21} Under Crim.R. 33(B), however, "[m]otions for a new trial based upon newly discovered evidence must be filed within one hundred twenty days after the verdict was rendered, unless it appears by clear and convincing proof that the movant was unavoidably prevented from discovering the new evidence[.]" "[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." *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 16 (2d Dist.), citing *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

{¶22} A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence may be granted only if that 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. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶23} By its terms, Crim.R. 33 does not require a hearing on a motion for a new trial. Thus, the decision to conduct a hearing is one that is entrusted to the discretion of the trial court. *State v. Smith*, 30 Ohio App.3d 138, 139, 506 N.E.2d 1205 (9th Dist.1986). The decision whether to grant a motion for a new trial also lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).

VI. Analysis

{¶24} Conner's motion for a new trial was filed two years after the jury returned a guilty verdict against him. Thus, the preliminary question before us in the instant case is whether Conner has shown by clear and convincing evidence that he was unable to timely discover this alleged "new evidence" with due diligence.

{¶25} Conner does not state a reason as to why he was "unavoidably prevented" from discovering Alston, Wooten, and Grant earlier. But a defendant is entitled to a hearing on his motion for leave if he submits "documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence" at issue. *State v. Gray*, 8th Dist. Cuyahoga No. 94282, 2010-Ohio-5842, ¶ 20, citing *State v. York*, 2d Dist. Greene No. 99-CA-54, 2000 Ohio App. LEXIS 550 (Feb. 18, 2000). Even though Conner does not state a reason as to why he was "unavoidably prevented" from discovering Alston, Wooten, and Grant earlier, we can glean from their affidavits that Conner may not have even known these witnesses were at Sirrah House on the night that Woodard was killed. Due diligence on Conner's part therefore would not have

"discovered" these witnesses if Conner did not even know they were there.

{¶26} Nonetheless, Conner does not meet the *Petro* criteria. Essentially, the witnesses' affidavits attempt to establish a couple of things. We say "attempt" because it is a little unclear. But it appears that Wooten saw "a light-skinned guy wearing white" shooting a gun on the night of the incident. Grant and Alston did not see the actual shooting, but did see a "light-skinned male * * * with white on" running past them with a gun in his hand and blood on his clothes. It is not clear who the "light-skinned male" is from these affidavits, but Conner points to the transcript from trial, claiming it shows that Hollowell was wearing white clothes. The evidence does show that Hollowell was wearing white pants, but not a white shirt (he was wearing a black shirt). These three witnesses also state that they saw Conner running from police, that police shot at Conner, and that Conner did not have a gun on him.

{¶27} In this case, the state presented evidence at trial that three police officers saw Conner shooting a gun. One police officer even described the gun that he saw Conner shooting. The police officers also saw Conner duck down between cars before running up the street. Later, the officers found a gun — that matched the description of the officer who saw Conner shooting it — between the cars where Conner had ducked down before running up the street. Six spent shell casings found at the scene, plus a bullet taken from the victim's knee, all matched the gun found by police. This evidence is overwhelming, as we stated in our decision denying Conner's application to reopen his appeal. *Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-4669, ¶ 12.

{¶28} Thus, the statements set forth in Alston's, Wooten's, and Grant's affidavits contradict Officer Przybylski's, Dickens's, and Saffo's testimony at trial — that they not only observed Conner with a gun in his hand, but also shooting the gun several times. Officer Przybylski even described the gun that Conner was shooting, and Officers Dickens and Saffo found a gun — as Officer Przybylski had described — where Conner had been hiding between cars moments before the gun was found. Under *Petro*, evidence that merely contradicts former evidence is not sufficient under Crim.R. 33(A)(6).

{¶29} Moreover, the trial court judge reviewing Conner's motion for a new trial also presided over his trial. "'[T]he acumen gained by the trial judge who presided during the entire course of [the] proceedings makes [her] well qualified to rule on the motion for a new trial on the basis of the affidavit[s] and makes a time consuming hearing unnecessary.'" *State v. Monk*, 5th Dist. Knox No. 03CA12, 2003-Ohio-6799, ¶ 20, quoting *United States v. Curry*, 497 F.2d 99, 101 (5th Cir.1974).

> "The trial judge is in a peculiarly advantageous position * * * to pass upon the showing made for a new trial. [The judge] has the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives that prompted the recantation. [The judge] is, therefore, best qualified to determine what credence or consideration should be given to the retraction, and [the judge's] opinion is accordingly entitled to great weight. If the rule were otherwise, the right of new trial would depend on the vagaries and vacillations of witnesses rather than upon a soundly exercised discretion of the trial court."

Taylor v. Ross, 150 Ohio St. 448, 452, 83 N.E.2d 222 (1948), quoting *State v. Wynn*, 178 Wash. 287, 34 P.2d 900 (1934).

{¶30} Conner points to *State v. Covender*, 9th Dist. Lorain No. 11CA010093, 2012-Ohio-6105, and *State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, in support of his argument that the trial court erred in denying his motion without an evidentiary hearing. We find these cases to be distinguishable.

{¶31} In *Covender*, the defendant was convicted of sexually abusing his four- and six-year-old stepchildren. He spent more than ten years in prison. As adults, the stepchildren came forward to testify that the alleged abuse had never happened. After many years of various procedural attempts to obtain a new trial, the defendant filed his third motion for a new trial based upon newly discovered evidence. The defendant had obtained the older child's counseling records from when she was young, which contained potentially exculpatory material. The trial court denied the defendant's motion for a new trial, finding that the defendant knew about the child's therapy records before his trial and should have obtained them. The Ninth District held that the trial court's decision denying the defendant's motion for a new trial was unreasonable under the circumstances (including the fact that the defendant had requested an in camera inspection of the records before trial, which occurred, but the trial court refused to disclose the contents of the records). *See id*. at ¶ 17-23. The sound reasoning in *Covender* simply has nothing to do with the facts of the present case.

{¶32} *Carusone* is likewise inapplicable here. In *Carusone*, the defendant was convicted of murdering his neighbor. After the defendant was convicted, his mother obtained the case file, researched the evidence, and made public-record requests.

Through her research, she learned the state had withheld evidence from the defense regarding the victim's medical records as to the cause of the victim's death. The First District held, among other reasons, that under these circumstances, the trial court should have granted a new trial. *See id.* at ¶ 19-39. Again, *Carusone* has nothing to do with the facts in this case.

{¶33} After review, we find that Conner's "newly discovered evidence" contradicts evidence submitted at trial. Further, based on the police officers' testimony, even if Conner was granted a new trial, there is not "a strong probability that it will change the result if a new trial is granted." Thus, we cannot say that the trial court abused its discretion in denying Conner's motion without an evidentiary hearing.

{¶34} Conner's sole assignment of error is overruled.

{¶35} Judgment affirmed.

It is ordered that appellee recover from appellant the 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. 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.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR