

[Cite as *State v. Abdul*, 2016-Ohio-3063.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103510

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMIL SHABAZZ ABDUL**

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-07-495551-A

**BEFORE:** Kilbane, P.J., Boyle, J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** May 19, 2016

**APPELLANT**

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Jamil A. Shabazz Abdul (“Shabazz Abdul”), appeals the trial court’s decision denying his third successive motion for a new trial. For the reasons that follow, we affirm.

{¶2} On November 19, 2007, after a five-day trial, Shabazz Abdul was convicted of murder with a firearm specification in connection with the shooting death of Gregory Rogers. He was sentenced to 15 years to life, plus 3 years for the weapon.

{¶3} Shabazz Abdul filed a direct appeal to this court in which he challenged the sufficiency of the evidence supporting his conviction because the shooting was the result of an accident, and he appealed the effectiveness of his trial counsel for claimed omissions during the voir dire of the jury. This court rejected those contentions and affirmed his conviction. *State v. [Shabazz] Abdul*, 8th Dist. Cuyahoga No. 90789, 2009-Ohio-225 (“*Shabazz Abdul I*”). On May 7, 2009, Shabazz Abdul applied to reopen our judgment in *Shabazz Abdul I*, claiming that he had received ineffective assistance of appellate counsel. Shabazz Abdul argued that his appellate counsel should have included these additional assignments of errors error: (1) his trial counsel erred in not presenting evidence (from an investigator’s report) that Shabazz Abdul initially claimed that the shooting was accidental; (2) trial counsel did not share witness statements with Shabazz Abdul; (3) trial counsel did not effectively cross-examine a witness (William Green); and (4) the trial court should have appointed new counsel. This court denied the

motion to reopen in *State v. [Shabazz] Abdul*, 8th Dist. Cuyahoga No. 90789, 2009-Ohio-6300 (“*Shabazz Abdul II*”).

{¶4} While *Shabazz Abdul II* was pending, Shabazz Abdul filed a petition for postconviction relief in the trial court. He once again challenged the adequacy of his trial counsel’s cross-examination of Green, raised various evidentiary inconsistencies, and complained that his trial attorney did not subpoena key witnesses. The state filed a motion for summary judgment, which was granted by the trial court. On appeal, this court affirmed. *State v. Shabazz [Abdul]*, 8th Dist. Cuyahoga No. 94738, 2010-Ohio-5789 (“*Shabazz Abdul III*”).

{¶5} On May 17, 2012, Shabazz Abdul filed his first motion for a new trial in which he challenged his indictment, the amendment of his indictment, and the court’s jury instructions. This motion was denied, and on appeal this court affirmed. *State v. [Abdul] Shabazz*, 8th Dist. Cuyahoga No. 98601, 2013-Ohio-267 (“*Shabazz Abdul IV*”).

{¶6} On September 9, 2013, Shabazz Abdul filed his second motion for a new trial

contending that he recently received newly discovered evidence that was not available at trial. Based on this new evidence, Shabazz raised various arguments in support of his motion, including (1) the prosecutor committed misconduct by withholding evidence and allowing perjured and hearsay testimony, and (2) he received ineffective assistance of counsel because his trial counsel proceeded with trial even though he had not received all discovery prior to trial. Specifically, [Shabazz Abdul] contends that the witness statements made by Dwayne Saunders, Theodore Carter, and William Green, and the journal entries of conviction depicting Green’s criminal history were not given to defense; thus, the discovery rules were

not complied with and the evidence demonstrates that the trial testimonies by these witnesses were improper.

*State v. Shabazz [Abdul]*, 8th Dist. Cuyahoga No. 100623, 2014-Ohio-3142, ¶ 5 (“*Shabazz Abdul V*”). The trial court denied the second motion for a new trial and this court affirmed on appeal. *Id.*

{¶7} On June 11, 2015, Shabazz Abdul filed a motion for leave to file his third motion for a new trial. He asserted that defendant can prove that his substantial rights under Crim.R. 33(A)(1)-(6) were violated, and he was unavoidably prevented from getting newly discovered exculpatory evidence. However, he did not present this evidence to the court. The trial court denied the motion for leave to file his third motion for a new trial on June 18, 2015. Nonetheless, on August 19, 2015, Shabazz Abdul filed his third motion for a new trial, which gives rise to this instant appeal. Within this motion, Shabazz Abdul argued that: (1) there was “plain error” in the trial, including that the jury should have considered lesser included offenses; (2) the state’s witnesses collectively agreed on their testimony, and (3) the prosecuting attorney withheld exculpatory evidence. Again, the claimed exculpatory evidence was not presented to the trial court in support of the motion. On August 24, 2015, the trial court denied the motion for a new trial. Shabazz Abdul appeals for the sixth time and assigns the following errors for review:

#### Assignment of Error One

Trial court erred when it denied [Shabazz Abdul’s Crim.R.] 52(B) plain error motion base[d] on substantial rights violation of withholding (exculpatory evidence) during trial.

### Assignment of Error Two

Trial court erred by denying [Shabazz Abdul's Crim.R.] 52(B) plain error motion based on abuse of discretion by the court.

### Assignment of Error Three

Trial court erred when it denied [Shabazz Abdul's Crim.R.] 52(B) plain error motion seeking a new trial base[d] on prosecutorial misconduct.

### Assignment of Error Four

Trial court erred when it denied the [Shabazz Abdul's Crim.R.] 52(B) plain error motion due to ineffective assistance of counsel.

{¶8} Within these assigned errors, Shabazz Abdul argues that the trial court erred in denying his third successive motion for a new trial because he has raised “plain error,” which he claims is not barred by res judicata. He also contends that he is entitled to a new trial because: (1) the state withheld exculpatory evidence (that others at the party also had guns); (2) the state failed to provide discovery (as allegedly demonstrated by his attorney's 2013 letter stating that, prior to the trial, he had not received police reports that are now routinely given because of open discovery changes); (3) the state impermissibly “amended” the indictment; and (4) he should have been assigned different trial counsel. In support of these contentions, he has appended various documents to his appellate brief, which were not provided in support of the motion he filed below. These documents include an undated investigator's report, a 2007 affidavit from Dale Beckett stating that

the shooting appeared to have been an accident, and a 2007 crime scene summary in which Theodore Carter explained the events preceding the shooting and described it as the unintended result of removing Rogers from Carter's house.

#### Standard of Review

{¶9} A motion for new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus. That is, both aspects of Crim.R. 33, permission for leave to file a motion for a new trial, and the court's ruling on the motion are reviewed under the abuse of discretion standard. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

Further, as explained in *Shabazz Abdul V*,

[m]otions for a new trial are governed by the framework provided in Crim.R. 33. Crim.R. 33(B) requires a motion for a new trial to be made within 14 days after a verdict is rendered. If a motion for a new trial is made on grounds of newly discovered evidence, the motion must be filed within 120 days after the day the verdict is rendered. *Id.* A defendant may file a motion for a new trial outside the 120-day deadline only by leave of court and only 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[.]" *Id.* Because the 120-day deadline has expired, Shabazz needed leave to file his motion and establish, by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence. *State v. Clement*, 8th Dist. Cuyahoga No. 97930, 2012-Ohio-3818, ¶ 4-5.

*Id.* at ¶ 9. It is also within the discretion of the trial court to determine whether a motion for a new trial and the material submitted with the motion warrants an evidentiary hearing. *State v. Hill*, 64 Ohio St.3d 313, 333, 1992-Ohio-43, 595 N.E.2d 884.

### Res Judicata

{¶10} As we stated in *Shabazz Abdul V*, successive motions for a new trial are barred by res judicata. *Id.* at ¶ 13, citing *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11. In *Lloyd v. Robinson*, 4th Dist. Ross No. 14CA3462, 2015-Ohio-1331, the court explained:

Lloyd also claims that res judicata is inapplicable because he is raising plain, structural errors that must be addressed regardless of previous actions. But even plain errors are precluded by res judicata. *See State v. Haynes*, 2d Dist. Clark No. 2013 CA 90, 2014-Ohio-2675, ¶ 14. (“The issues raised in [the defendant’s] assignments of error could have been raised on direct appeal, and are barred by res judicata, regardless of whether they might be characterized as plain error”); *State v. Dover*, 5th Dist. Stark No. 2014 CA 00073, 2014-Ohio-3200, ¶ 34 (“The doctrine of res judicata bars appellant from raising this issue anew via a motion for plain error review \* \* \* [b]ecause appellant could have raised the claim on direct appeal”). And Lloyd cites no persuasive authority in support of his contentions that his claims raise structural errors, or that these errors are not also barred by res judicata. Therefore, we reject Lloyd’s additional contention.

*Id.* at ¶ 16.



{¶11} In his June 11, 2015 motion for leave to file his third successive motion for a new trial, Shabazz Abdul asserted, but did not present clear and convincing proof that he was unavoidably prevented from the discovery of the new evidence, and he never presented that evidence to the trial court. The claimed new evidence was also omitted from Shabazz Abdul's August 19, 2015 motion, and it was presented for the first time as an attachment to his appellate brief. Consequently, the third successive motion for a new trial suffers from the same defect noted in *Shabazz Abdul IV*, where this court stated:

It is undisputed that appellant filed his motion for a new trial outside the 120-day window established by Crim.R. 33(B). In order to obtain leave to file his motion for a new trial, he had to establish, by clear and convincing proof, that he was unavoidably prevented from discovering new evidence. [*Clement*], 8th Dist. No. 97930, 2012 Ohio 3818, ¶ 4-5. As appellant's motion failed to offer proof of any kind to show why he was unavoidably prevented from the discovery of any new evidence that would entitle him to a new trial, we cannot say that the trial court abused its discretion in denying his motion. *Id.* at ¶ 6.

Even if appellant's motion was not time barred pursuant to Crim.R. 33(B), we note that appellant's assignments of error are also barred by the doctrine of res judicata.

*Shabazz Abdul IV* at ¶ 9-10.

{¶12} Apart from this defect, the third successive motion for a new trial raises the same issues that were previously rejected in the 2013 motion for a new trial. In affirming that ruling, we noted:

In this case, Shabazz maintains in his motion that he was unavoidably prevented from discovering this evidence because he and his counsel were denied discovery of witness statements and their criminal histories. In support, he attached the witness statements of Saunders, Carter, and Green, and the entries of criminal conviction pertaining to Green. He also attached a letter from one of his trial attorneys that indicated that open

discovery was not available at the time of his trial and that the reports were not given to defense counsel.

Although Shabazz has now obtained possession of the witness statements and criminal convictions, his blanket assertions that these documents show hearsay and perjured testimony are insufficient to withstand his burden that these documents were not available at the time of trial. In fact, his prior appeals demonstrate that this evidence was available at trial, was reviewed during the appropriate times at trial, and used by counsel at trial where defense counsel determined it was beneficial. *See Shabazz Abdul II and III.*

In *Shabazz [Abdul] II*, this court held that trial counsel was not ineffective for failing to share discovery, i.e. witness statements, with Shabazz or use Green's criminal history for impeachment at trial. *Id.* at ¶ 8-9. Accordingly, this evidence was available a trial, and Shabazz was not unavoidably prevented from discovering this evidence because it was the underlying issue to his arguments in a prior appeal. Moreover, Green's prior convictions were public records, which could be discovered. Furthermore, in *Shabazz II*, this court held that the state complied with the then-existing discovery rules; thus, there was no withholding of evidence by the state. *Id.* at ¶ 8.

Accordingly, because the arguments Shabazz makes in this appeal were previously considered and rejected in his prior appeals, the doctrine of res judicata applies.

*Shabazz Abdul V* at ¶ 10-13.

{¶13} In this matter, the exhibits were never presented to the trial court and are offered for the first time on appeal. Moreover, the substance of this information, i.e., that the shooting accidentally occurred while Rogers was being removed from Carter's home, has been repeatedly considered and rejected by this court. Therefore, we conclude that the third successive motion for a new trial is untimely, barred by res judicata, and is also without merit.

{¶14} Accordingly, the assignments of error are overruled.

{¶15} 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and  
ANITA LASTER MAYS, J., CONCUR