[Cite as *State v. Washington*, 2016-Ohio-5329.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103875

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MELVIN K. WASHINGTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-00-394348-B

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

RELEASED AND JOURNALIZED: August 11, 2016

APPELLANT

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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor

By: Gregory J. Ochocki
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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Melvin K. Washington appeals pro se the trial court's denial of his motion for the discovery of new evidence and request for leave to file a motion for a new trial. He assigns the following error for our review:

> I. Trial court violated appellant's U.S. Constitutional Rights by denying Melvin Washington's request for declaration mandating Melvin Washington was prevented from discovery of new evidence along with leave request for a new trial when Melvin Washington's request went unopposed, more so Melvin Washington's filings stated factual and legal basis for relief.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶3} On February 13, 2001, a jury convicted Washington of murder and aggravated robbery, and the trial court separately found him guilty for having a weapon while under disability. The trial court sentenced Washington to a mandatory term of 15 years to life in prison for the murder and eight years for the aggravated robbery to be served consecutive to the murder. He was sentenced to 11 months for having a weapon while under disability count to run concurrent with the other two counts. Thus, Washington received a total term of 23 years to life in prison.

{¶4} Washington filed a direct appeal; this court affirmed his conviction in *State v. Washington*, 8th Dist. Cuyahoga No. 79300, 2002 Ohio App. LEXIS 460 (Feb. 7, 2002). The facts surrounding the case were set forth in the appellate opinion as follows:

> The record reveals that, on July 14, 2000, Washington and four accomplices, James Terry, Lonnie Gwin, Jacques Bradley and Henry Eggleston, traveled from the east side of Cleveland to the west side for the purpose of committing robberies. Terry, Gwin, and Eggleston rode in a white Honda while Bradley and Washington followed in a black Pontiac Grand Prix.
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> Once on the west side, the cars became separated. Terry drove down a side street off West 130th Street looking for Bradley's car; there, Gwin, who had a .357 Magnum revolver, and Eggleston, who had a .38 caliber revolver, jumped out of the car and robbed two strangers at gunpoint. They then got back into the Honda and drove down West 130th Street, where they located Bradley and Washington.
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> At that point, Washington exited the Pontiac and Gwin exited the Honda, and they walked toward the intersection of West 130th Street and St. James Avenue. There, they waved down a white Chevrolet driven by Michael Carnell, who frequented the area to buy crack cocaine. Carnell got out of his vehicle and approached Gwin and Washington, apparently believing, based on their wave-down, that they were drug dealers. When Carnell figured out that they did not have any drugs, he turned to walk back to his vehicle; at that point, Washington shot him in the back with a nine millimeter semi-automatic handgun and then rummaged through his pockets and took $40 in cash.
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> Prior to these events, Kent Williams, who lived in the area, had gone out to get something to drink. As he exited J.J.'s, he met up with three teenagers whom he recognized from the neighborhood. As the four proceed to walk north on West 130th Street, they saw two men trotting toward them; at that point, Williams and his three companions crossed the street to avoid the two men. From the other side of the street, Williams observed one of the two men flag down Carnell's car, saw Carnell get out of his car, and witnessed one of the men shoot him from behind. According to Williams, both robbers had guns. Williams ran from the scene but later returned after the police had arrived.

> After the shooting, Gwin jumped back into the Honda, and Terry followed the Bradley car until it made a left-hand turn. At this time, Gwin instructed Terry not to follow Bradley any longer; he then told Terry and Eggleston what had happened. The trio in the Honda then began searching for the highway so they could get back to the east side.
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> Around 11:40 p.m., Patrol Officer Brian Morehead and his partner, Officer Klamert, received a broadcast of a shooting at West 130th Street and St. James. Minutes later, they received a description of a white Honda containing three black male suspects. Five minutes after that, they spotted the Honda and pulled it over on Lorain Avenue near West 106th Street. The officers arrested Gwin, Terry, and Eggleston and transported them to the scene of the crime, where Williams identified Gwin as the shooter but could not identify either Terry or Eggleston as the other robber.
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> At the scene of the crime, police recovered a nine millimeter shell. Later, Officer Adrian Neagu searched the Honda and re-covered two weapons, later identified by Detective Thomas Lucey of the forensic unit as an operable .38 caliber revolver, which Eggleston admitted to carrying, and an operable .357 Magnum revolver, which Gwin carried during both robberies. The police never recovered the nine millimeter semi-automatic handgun used to shoot Carnell.
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> A few hours later, on July 15, 2000, around 3:30 a.m., Carnell died from the gunshot wound that entered the right side of his back, perforated his spinal cord, and exited his left chest. Later that day, police arrested Washington.

{¶5} In support of the charges against Washington, the state called 25 witnesses, including Washington's codefendants Gwin, Terry, Eggleston, and Bradley, who testified against Washington. A jailhouse informant, who was also an acquaintance of Washington's, also testified that Washington admitted that he shot a man during a west-side robbery.

{¶6} On November 16, 2015, Washington filed a pro se motion in which he filed leave to file a motion for a new trial beyond the 120-day deadline based on the fact he

was prevented from the discovery of new evidence. The new evidence consisted of his codefendant Lonnie Gwin recanting his testimony implicating Washington as an accomplice to the robbery and murder of Carnell. He claimed that Gwin's recantation was proof that his notice of alibi that he provided the prosecution was sound and that his codefendants testified against him in order to receive favorable plea deals.

{¶7} Attached to the motion was an affidavit by Lonnie Gwin, sworn to on October 25, 2012, in which he stated that he did not truthfully testify at trial and that codefendant Jamal Eggleston forced him to say that Washington committed the first robbery to save "Jamal's ass." According to Gwin, he told the prosecutor "this but in order for my pleas to remain good, I had to say what the prosecutor told me to say."

{¶8} Also attached to the motion were two letters that Gwin wrote to Washington while in prison. The first, dated December 27, 2012, apologized for the fact that Washington was "locked up behind something that I did. * * *." In the letter, Gwin goes on to state:

> I take total responsibility for my actions for taking that man's life that night. I don't know what gotten in me for making them young boys say it was you. I was just scared at the time for not taking responsibility for my actions for committing a crime.
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> * * *
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> Because I don't know what I was thinking about at that time it happened. I don't know why I even put you with me that night. You was a street over waiting in the car. In [sic] that's when Jamal told me to say you did it instead of me when I should of said that it was him because he was with me when the shit happened. So, I'm just keeping one-hundred I just don't want to tell them I did it because I'm scared that they're gonna recharge me for something I did.

{¶9} In the second letter, dated January 5, 2013, Gwin questions why Washington has not responded to his apology. He then goes on to state:

> I told you in the first letter let me clear my head in [sic] make it right by you. I'm just gonna say Jamal did it if it come down to it because if I admit to what I did then they gonna try to recharge me so let me figure this shit out.

{¶10} Also attached to the motion was an affidavit by a Donterl Johnson, sworn to on October 31, 2015. Johnson averred that he had Lonnie Gwin's affidavit in his possession for three years and that he had attempted to send it to Washington but that it was returned to him. He was able to recently give it to Washington when he discovered that Washington was in the same prison as Johnson.

{¶11} Washington also attached his own affidavit in which he stated his inability to obtain appointed counsel, and his financial status delayed his ability to file the motion.

{¶12} The trial court denied Washington's motion concluding as follows in the journal entry "states no factual or legal basis for relief." Journal Entry, November 19, 2015.

Denial of Leave to File Motion for a New Trial

{¶13} In his sole assigned error, Washington argues that the trial court erred by refusing to grant him leave to file a motion for a new trial.

{¶14} Crim.R. 33(A)(6) permits a convicted defendant to file a motion for a new trial within 120 days after the day of the verdict on grounds that new evidence material to the defense has been discovered. If a motion based on newly discovered evidence is filed more than 120 days after the verdict, the defendant must first seek leave by making a

showing by clear and convincing evidence that the defendant was "unavoidably prevented" from discovering the new evidence. Crim.R. 33(B).

{¶15} A defendant is unavoidably prevented from discovering evidence when the defendant had no knowledge of the existence of the ground supporting the motion for new trial and could not, in the exercise of reasonable diligence, have learned of the existence of that ground within the required time for filing the motion for a new trial. *State v. Walden*, 19 Ohio App.3d 141, 146, 483 N.E.2d 859 (10th Dist.1984). We cannot disturb the court's decision to either grant or deny leave under Crim.R. 33 unless the court abused its discretion. *State v. Pinkerman*, 88 Ohio App.3d 158, 160, 623 N.E.2d 643 (4th Dist.1993).

{¶16} The trial court did not abuse its discretion by denying Washington's motion for leave to file a motion for a new trial. Although Gwin's recantation came well after the 120-day deadline, a "'trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.'" *State v. Berry*, 10th Dist. Franklin No. 06AP-803, 2007-Ohio-2244, ¶ 37, quoting *State v. Griffith*, 11th Dist. Trumbull No. 2005-T-0038, 2006-Ohio-2935, ¶ 15. Thus, even if a defendant has established that he was unavoidably prevented from filing his motion for a new trial within the time limits, if there was an "undue delay in filing the motion after the evidence was discovered, the trial court must determine if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay." *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 Ohio App. LEXIS 4561 (Oct. 9,

1997). *See also State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001 Ohio App. LEXIS 1623 (Apr. 6, 2001).

{¶17} The trial court could have determined that it was not reasonable for Washington to wait three years after receiving the first letter from Gwin to file his motion for leave. Although Washington stated his financial status prevented him from filing his motion, as he discovered, he could file pro se.

{¶18} Moreover, although Washington attached Johnson's affidavit in which Johnson stated he had Gwin's affidavit in his possession for three years before he was able to locate Washington, Johnson gives no reason why Gwin gave him the affidavit to mail. Johnson appears to be a fellow inmate. Gwin obviously had Washington's address by the fact he sent him two letters. Thus, the trial court could have chosen to not believe Johnson's affidavit and concluded that Washington, in fact, had Gwin's affidavit for three years prior to filing the motion.

{¶19} Moreover, newly discovered evidence that purportedly recants testimony given at trial is "looked upon with the utmost suspicion." *State v. Nash*, 8th Dist. Cuyahoga No. 87635, 2006-Ohio-5925, ¶ 10. "Recanting affidavits and witnesses are viewed with extreme suspicion because the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both times." *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 29. Consequently, "there must be some compelling reason to accept a recantation over testimony given at trial." *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387, ¶ 13.

{¶20} Thus, a defendant is not necessarily entitled to a new trial when a witness submits an affidavit recanting trial testimony. *Gray*, 8th Dist. Cuyahoga No. 82841, 2003-Ohio-6643, ¶10. Instead, when a defendant seeks a new trial based upon a witness's recanted testimony, the trial court must evaluate the credibility of the recanting witness. *Toledo v. Easterling*, 26 Ohio App.3d 59, 60, 498 N.E.2d 198 (6th Dist.1985). The court must determine whether the recanting witness told the truth at trial or if the witness's recantation is true. *Id*. If the trial court determines the recantation is believable, the trial court must then determine whether the recanted testimony would have materially affected the outcome of trial. *State v. Brown*, 7th Dist. Mahoning No. 10 MA 17, 2010-Ohio-405, ¶ 47.

{¶21} Additionally, a trial court need not necessarily hold a hearing to ascertain the credibility of the recanted affidavit testimony. *State v. Hatton*, 4th Dist. Pickaway No. 13CA26, 2014-Ohio-3601, ¶ 13; *State v. Quinn*, 2d Dist. Clark No. 2014-CA-95, 2016-Ohio-140, ¶ 17; *State v. Brooks*, 8th Dist. Cuyahoga No. 75522, 1999 Ohio App. LEXIS 3596 (Aug. 5, 1999). "[T]he decision of whether a hearing is warranted upon such a motion also lies soundly with the discretion of the trial court." *State v. Butler*, 2d Dist. Clark No. 2003 CA 26, 2004-Ohio-2036, ¶ 19. For instance, a hearing would not be necessary when an affidavit appears insufficient on its face. *Quinn*.

{¶22} Here, Gwin's affidavit is particularly suspicious. Gwin's affidavit was sworn in 2012, prior to his two letters to Washington. However, Gwin makes no reference to the affidavit in his letters to Washington. Moreover, the affidavit conflicts with the first letter. In the affidavit, he states that Jamal is the one who committed the

crime, while in the letter, he admits that he is the one who committed the crime. Gwin's statement in the letter that Washington was "waiting in a car one street over" also conflicts with Washington's notice of alibi in which he stated he was with his mother from 10 p.m. until 1 a.m. Additionally, the evidence at trial indicated two cars and five individuals were involved that night. Thus, the fact that Washington was in the other car, does not absolve him of criminal liability.

{¶23} Additionally, although Gwin recanted his testimony, the testimony of Washington's other codefendants still stand and the testimony was corroborated by a jailhouse informant who testified that Washington admitted to the robbery and murder during a conversation they had in jail. Thus, Gwin's recantation alone merely impeaches the testimony of the other codefendants. The test for a new trial is whether the newly discovered evidence would create a strong probability of a different result at trial, or whether it is merely impeaching or contradicting evidence that is insufficient to create a strong probability of a different result. *State v. Petro*, 148 Ohio St. 505, 76 N.E. 370 (1947), syllabus.

{¶24} The trial court did not abuse its discretion by overruling Washington's motion. Accordingly, Washington's sole assigned error is overruled.

{¶25} Judgment 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 be sent to the Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR