[Cite as *State v. Peters*, 2009-Ohio-6024.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO Appellee v. LEANNE PETERS Appellant	C. A. No. 09CA0007 APPEAL FROM JUDGMENT ENTERED IN THE WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO CASE No. TRC 07-11-12349

DECISION AND JOURNAL ENTRY

Dated: November 16, 2009

CARR, Presiding Judge.

{¶1} Appellant, Leanne Peters, appeals the judgment of the Wayne County Municipal Court. This Court affirms.

I.

{¶2} On November 26, 2007, Leanne Peters was cited for driving while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), failure to wear a safety belt in violation of R.C. 4513.263(B)(1), and a marked lane violation under R.C. 4511.33. Peters pled not guilty to the three charges and a bench trial ensued. On January 22, 2008, the judge found Peters guilty of all three charges. On direct appeal, this Court affirmed the judgment of the trial court in *State v. Peters*, 9th Dist. No. 08CA0009, 2008-Ohio-6940.

{¶3} Almost a year after her conviction, on January 6, 2009, Peters filed a motion for a new trial pursuant to Crim.R. 33(A)(6) on the grounds that new evidence material to her defense had been obtained. Specifically, Peters argued that she had been diagnosed with Multiple

Sclerosis in December 2008, and the disease's symptoms were interpreted by the arresting officer as drug-induced impairment. On January 16, 2009, Peters' motion for a new trial was denied by the Wayne County Municipal Court. In the judgment entry of the trial court, the trial judge noted that Peters' motion did not contain the required witness affidavits of those who would testify as to the purported new evidence. The trial judge also noted that Peters did not provide clear and convincing proof that she was unavoidably prevented from discovering the new evidence which would allow for the proper filing of a motion for a new trial outside the timeframe set forth in Crim.R. 33(B).

{¶4} On February 12, 2009, Peters filed a notice of appeal. Peters raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶5} Peters argues her motion for a new trial pursuant to Crim.R. 33 would have been granted were it not for the ineffective assistance of counsel. This Court disagrees.

{¶6} A trial court's ruling on a motion for a new trial under Crim.R. 33 will only be reversed upon an abuse of discretion. *State v. Herb*, 167 Ohio App.3d 333, 2006-Ohio-2412, at ¶6. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶7} In order to prevail on a claim of ineffective assistance of counsel, Peters must show that "counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance." *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Peters must show that counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Peters must demonstrate that but for counsel's errors, there is a reasonable probability that the results of the trial would have been different. Id.

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

> "(6) 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."

{¶9} Crim.R. 33(B) states, in part:

> "Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. 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, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

{¶10} To grant a motion for a new trial based on the ground of newly discovered evidence, the movant must show 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 prior to 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. Hawkins* (1993), 66 Ohio St.3d 339, 350, quoting *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶11} In this case, Peters has not demonstrated that ineffective assistance of counsel resulted in the denial of her motion for a new trial. Peters' motion was denied on two separate grounds. First, the trial court found that Peters failed to present affidavits of medical professionals who would testify as to the existence of her medical condition and the symptoms associated therewith. Second, the trial court's judgment entry stated that Peters failed to "provide clear and convincing proof at the hearing or in her Motion that she was unavoidably prevented from discovering the new evidence which would allow for a longer period of time[]" to file the motion. The responsibility of attaching the appropriate affidavits to the motion for a new trial undeniably falls under the purview of the effective assistance of counsel. However, the record does not indicate that the trial court would have found that Peters provided clear and convincing proof that she was unavoidably prevented from discovering her medical condition but for the ineffective assistance of counsel.

{¶12} With regard to the 120-day period set forth in Crim.R. 33(B), Peters argues the trial court refused to consider the merits of her motion because counsel failed to file a motion for leave to file a motion for new trial. The purpose of filing a motion for leave would have been to get the trial court to entertain the motion for a new trial. Because the trial court considered the motion for a new trial, Peters was not prejudiced by the fact that her attorney never filed a motion for leave. Upon the filing of the motion for a new trial, the trial court promptly issued an order setting the matter for hearing before the court on January 15, 2009. In the trial court's judgment entry denying the motion, it was noted that the motion had been argued to the court. The judgment entry indicates that the trial court made a finding in the negative with regard to whether Peters provided clear and convincing evidence that she was unavoidably prevented from discovering the new evidence. The record does not contain a transcript from the hearing held on January 15, 2009. Therefore, this Court is unaware of the arguments made by the parties, as well as any evidence which may have been presented by the parties, on the issue of whether Peters was unavoidably prevented from discovering the new evidence. Peters, as the appellant in this case, has the duty to provide this Court with the portions of the record necessary to support her assignment of error. *State v. Johnson*, 9th Dist. No. 02CA008193, 2003-Ohio-6814, at ¶8; App.R. 9(B). Without an adequate understanding of the arguments offered at the hearing, as well as any evidence which may have been presented, this Court must presume regularity of the proceedings and affirm the trial court's judgment entry. See *Akron v. Hutton*, 9th Dist. No. 22425, 2005-Ohio-3300, at ¶22, citing *Johnson* at ¶8.

{¶13} It follows that Peters' sole assignment of error is overruled

III.

{¶14} Peters' sole assignment of error is overruled. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J.CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶15} I concur in the majority's opinion because, based solely on the evidence before us, there is no indication that the trial court abused its discretion in denying Peters' motion for a

new trial. Further, without the benefit of a transcript we cannot determine whether Peters' counsel was ineffective in pursuing Peters' motion for a new trial.

APPEARANCES:

DAVID T. EAGER, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.