

IN THE SUPREME COURT OF OHIO

LEWIS THOMAS III
Appellant

v.

STATE OF OHIO
Appellee

On appeal from the Hamilton
County Court of Appeals, First
Appellate District

Court Of Appeals
Case No. C-230363
C-230271

23-1040

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LEWIS THOMAS III

LEWIS THOMAS III
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Allen/Oakwood Corr. Inst.
P.O. Box 4501
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M.A. Powers
Hamilton County Prosecuting Attorney
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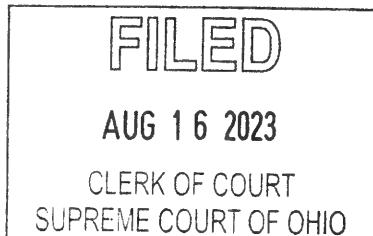
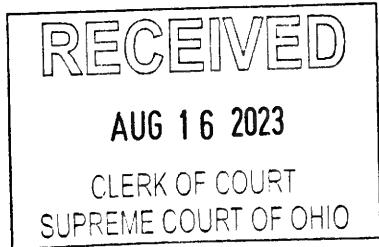


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When a motion for leave to file a delayed motion for a new trial is filed, the trial court has three options. First, if it determines that the documents in support of the motion on their face do not demonstrate that the movant was unavoidably prevented from discovering the evidence it may either overrule the motion or hold a hearing.	
Second, if the trial court determine that the documents submitted clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, the court must grant the motion for leave and allow the motion for a new trial to be filed. CRIM. R. 33(B) Thirdly, if the trial court determines the documents on their face support the movant's claim that he was unavoidably prevented from timely discovering the new evidence, the trial court must hold a hearing to determine whether there is a clear and convincing proof of unavoidably delay. CRIM. R. 33(B)	
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Explanation of this case is a felony case.

Explanation of this case is a felony case. This appeal should be granted or accepted based on the Supreme Court ruling in State v. Bethel-2022-ohio-783. In this case, on April 9, 2015, Appellant filed a motion for leave to file a delayed motion.

Appeal No's C-150581, C-150555 where the Trial Court in 2015 used CRIM. R. 57(B) to justify a reasonable time requirement for filing a motion for leave to file a motion for a new trial based on newly discovered evidence. The Appellate Court affirmed the court's judgment. SEE ATTACHED OPINION June 21, 2017.

On February 2, 2023, Appellant filed a motion for leave to file a delayed motion for a new trial. On February 17, 2023, Trial Court entered entry denying motion to file for new trial. Appellant did not receive the Court's Feb. 17, 2023 entry till some 90 days later whereby Appellant filed to Court of Appeals requesting to file a motion for delayed appeal.

On 6-1-2023, in Appeal No. C-230271 entry granting motion for delayed appeal. On July 5, 2023 filed a motion for delayed appeal in Case No. C-230363. Appellant's judgment entry on October 27, 2021 in Common Pleas Case Number B-8802582, the case was appealed to the Court of Appeals No. C-210659.

Herein, Appellant is appealing these entries on Feb. 17, 2023, Case No. B-8802582, October 27, 2021 on the grounds that they do not contain any appealable facts or determine issues raised in the Post Conviction Petition Nor in 33 (B) Motion For Leave to File a Motion For A New Trial.

STATEMENT OF CASE

Procedural Posture

Appellant was indicted in case B-882582 by the Hamilton County Grand Jury in 1988 on six counts of aggravated murder with specification, aggravated robbery with specification, attempted aggravated murder with two specifications, and three counts of felonious assault.

In 1988, the verdict of panel decision was filed and Appellant was found guilty of aggravated murder, not guilty of specification, guilty of aggravated robbery with specifications, and guilty of three counts of felonious assault with specifications.

September 13, 1988, Appellant was sentenced to 20 yrs. to life with no parole consideration until 20 years of incarceration; 15 to 25 years with three years actual time consecutive; 12 years to 15 years with three years actual time consecutive for an aggregate total of 41 years to life.

April 4, 1990, judgment affirming the verdicts of the trial panel in Appellate Case C-880637, reversing on the issues of specifications of use of weapon on allied counts. The Supreme Court Ohio denied Appellant's request to accept jurisdiction on appeal in Ohio Supreme Court Case 90-986.

(B) Statement of Facts

This case arises from Hamilton County Court of Common Pleas Judge Terry Nestor overruling Defendant-Appellant's Petition to vacate challenging subject matter jurisdiction of the 1988 trial court panel pursuant to Criminal Rule 6(F), 2939.22 of the Ohio Revised Code, and pursuant to Sup. R. 4, and 36, Ohio Hamilton Cty. LR. 7(A) challenging personal jurisdiction of the three judge panel trial court.

STATEMENT OF CASE Con't

(B) Statement of Facts

On October 27, 2021, Judge entered entry overruling request to vacate or set as well, in Case No. B-8802582. Judge Nestor entered February 17, 2023 Entry denying motion to file for new trial.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1

Findings of Facts and Conclusion of law are mandatory pursuant to R.C. 2953.21

APPEAL NO. C-230363

In case no. B-8802582, entry overruling request to vacate or set aside sentence entered October 27, 2021. Petitione's Constitutional Rights to Due process and Equal Protection of the law was violated.

Trial's entry of judgment's under Ohio Revised Code 2953.21 mandates that a judgment denying post conviction relief include findings of fact and conclusion of law, and that a judgment entry filed without such findings is incomplete and thus does not commence the running of the time period for filing an appeal therefrom.

State v. Mapson, 1 Ohio St.3d 217,218, 438 N.E. 2d 910. In State v. Brown (1974), 41 Ohio App.2d 181, 185 (70 0.0. 2d 349, that the failure of a trial judge to make the required findings is prejudicial error.

Proposition of Law No. 2

APPEAL NO. C-230271

When a Motion for leave to file a delayed motion for a new trial

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 2

APPEAL NO. C-230271

is filed, the trial court has three options. First, if it determines that the documents in support of the motion on their face do not demonstrate that the movant was unavoidably prevented from discovering the evidence, it may either overrule the motion or hold a hearing. Second, if the trial court determine that the documents submitted clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, the court must grant the motion for leave and allow the motion for a new trial to be filed. CRIM. R. 33(B) Thirdly, if the trial court determines the documents on their face support the movant's claim that he was unavoidably prevented from timely discovering the new evidence, the trial court must hold a hearing to determine whether there is a clear and convincing proof of unavoidably delay. CRIM. R. 33(B).

Appellant argument is that the Entry Denying Motion to file for a new trial entered Feb. 17, 2023 case no. B-8802582 and is contrary to the opinion in Appeal No's C-150581, C-150555 Trial No. B-8802582. The Court stated Thomas demonstrated that he had been unavoidably prevented from discovering the allegedly exculpatory evidence. The Entry does not comport to the three options in State v. Trimble, 2015 Ohio 942

CONCLUSION

The trial court entry's does not set-forth any appealable issues to raise on an appeal to a Court of Appeals to review. Such Entry violated the movrant Constitutional Rights to Due Process and Equal Protection

CONCLUSION

of law under 5th and 14th Amendments of the United States Constitution.



Lewis Thomas III

CERTIFICATE OF SERVICE

Herein, Movant Lewis Thomas III has mail to all parties a Notice of Appeal and a copy of the Memorandum In Support of Jurisdiction to the Clerk of the Supreme Court at 65 South Front Street, Columbus, Ohio 43215-3431

ON 8-3-23



Lewis Thomas III

APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMilton COUNTY, OHIO

STATE OF OHIO,
PLAINTIFF-APPELLEE,

APPEAL NO. C-230363
TRIAL NO. B-8802582

V.

ENTRY OF DISMISSAL

LEWIS THOMAS, III,
DEFENDANT-APPELLANT.

This case is before the Court on the notice of appeal, filed on July 5, 2023. According to the notice, appellant seeks to appeal an order entered on October 27, 2021 in common pleas Case No. B-8802582. Appellant has already appealed this order in Case No. C-210659. The right to appeal does not include multiple attempts to appeal the same order. The Court, therefore, dismisses this appeal. Costs taxed in accordance with App.R. 24.

To the clerk:

Enter upon the journal of the court on JUL 20 2023.

By: John C. Clark

Presiding Judge

(Copies sent to all counsel)

ENTERED
OCT 27 2021

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

STATE OF OHIO

VS.

CASE B8802582

LEWIS THOMAS III
DEFENDANT

ENTRY OVERRULING REQUEST
TO VACATE OR SET ASIDE
SENTENCE

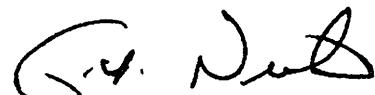
This matter having come before the Court on the Defendant's motion
EVIDENTIARY HEARING AND PETITION TO VACATE OR SET ASIDE
JUDGMENT OF CONVICTION OF SENTENCE.

The Court, being fully advised and after due consideration, finds the said motion not well taken, and overrules the same.

It is so ordered.



D133319697



JUDGE TERRY NESTOR
10/25/2021



COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

STATE OF OHIO

VS.

CASE B8802582

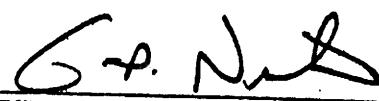
LEWIS THOMAS III
DEFENDANT

Entry Denying Motion to
FILE FOR NEW TRIAL

This matter came before the Court on the Defendant's Motion for leave to file a delayed motion for new trial.

The Court, being fully advised and after due consideration, finds the motion is not well taken at this time. The motion is Denied.

IT IS SO ORDERED.



JUDGE TERRY NESTOR
2/14/2023

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-150581 C-150555
Plaintiff-Appellee,	:	TRIAL NO. B-8802582
vs.	:	<i>OPINION.</i>
LEWIS THOMAS III,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
Defendant-Appellant.	:	

JUN 21 2017

Criminal Appeal From: Hamilton County Court of Common Pleas **COURT OF APPEALS**

Judgment Appealed From Is: Affirmed in C-150581;
Appeal Dismissed in C-150555

Date of Judgment Entry on Appeal: June 21, 2017

*Joseph T. Deters, Hamilton County Prosecuting Attorney, and Scott M. Heenan,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,*

Lewis Thomas III, pro se.

ENTERED
JUN 21 2017

MILLER, Judge.

{¶1} Today, we hold that a motion for leave under Crim.R. 33(B) to file a motion for a new trial must be filed within a reasonable time of the defendant's discovery of new evidence. Our holding aligns us with all nine of our sister appellate districts to visit this issue.

{¶2} Defendant-appellant Lewis Thomas III appeals from the Hamilton County Common Pleas Court's judgment overruling his Crim.R. 33(B) motion for leave to file a motion for a new trial. We dismiss the case numbered C-150555, because that appeal purports to be taken from a September 14, 2015 entry, but the record reflects no such entry. We affirm the court's judgment in the case numbered C-150581, because the court did not abuse its discretion in overruling Thomas's Crim.R. 33(B) motion upon its determination that his six-year delay in filing the motion was unreasonable.

{¶3} Thomas was convicted in 1988 of aggravated murder, aggravated robbery, and felonious assault. He unsuccessfully challenged his convictions in appeals to this court and the Ohio Supreme Court and in postconviction proceedings filed between 1990 and 2015. *See State v. Thomas*, 1st Dist. Hamilton No. C-880637, 1990 WL 37787 (Apr. 4, 1990), *appeal not accepted*, 54 Ohio St.3d 713, 526 N.E.2d 159 (1990); *State v. Thomas*, 1st Dist. Hamilton No. C-910145 (Feb. 14, 1992); *State v. Thomas*, 1st Dist. Hamilton No. C-050245, 2005-Ohio-6823 (Dec. 23, 2005); *State v. Thomas*, 1st Dist. Hamilton No. C-060355 (May 2, 2007).

* {¶4} Thomas here appeals the overruling of his April 2015 motion seeking leave under Crim.R. 33(B) to file a Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence. On appeal, he presents six assignments of

error. In his first assignment of error, he challenges the common pleas court's exercise of its discretion in overruling, and in declining to conduct an evidentiary hearing on, his Crim.R. 33(B) motion. In assignments of error two through six, he challenges his convictions. This court has jurisdiction to review only the judgment from which this appeal is taken. *See State v. Gipson*, 1st Dist. Hamilton Nos. C-960867 and C-960881, 1997 WL 598397 (Sept. 26, 1997). Accordingly, we have no jurisdiction to address the challenges to Thomas's convictions presented in assignments of error two through six. And we decide only the challenge in his first assignment of error, to the overruling of his Crim.R. 33(B) motion without a hearing.

→ **{¶5}** Crim.R. 33(A)(6) permits a court to grant a new trial on the ground that "new evidence material to the defense [has been] discovered, which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(B) requires that a Crim.R. 33(A)(6) motion be filed either within 120 days of the return of the verdict or within seven days after the court, upon "clear and convincing proof that the defendant [had been] unavoidably prevented from discovering the evidence" within the 120-day period, grants leave to file a new-trial motion out of time.

{¶6} Thomas was convicted in 1988. In 2015, he sought leave under Crim.R. 33(B) to file a Crim.R. 33(A)(6) motion. He claimed that he is actually innocent of the offenses for which he was convicted. He supported that claim with evidence in the form of law-enforcement and hospital reports that he insisted demonstrated his innocence, along with police and prosecutorial misconduct. And he asserted that that evidence should have been, but was not, disclosed in discovery,

OHIO FIRST DISTRICT COURT OF APPEALS

and that he had not known what the evidence would show until he received it from the Ohio Public Defender in 2009.

{¶7} In seeking leave to move for a new trial upon his actual-innocence claim, Thomas bore the burden of proving by clear and convincing evidence that, within 120 days of the return of the verdicts in his case, he did not know of the existence of that proposed ground for a new trial, and that he could not, in the exercise of reasonable diligence, have learned of its existence. *See Crim.R. 33(B); State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *State v. Hawkins*, 1st Dist. Hamilton No. C-110291, 2011-Ohio-5645, ¶ 14. Thomas demonstrated that he had been unavoidably prevented from discovering the allegedly exculpatory evidence until 2009, when he received that evidence from the public defender. But the common pleas court overruled Thomas's Crim.R. 33(B) motion upon its determination that he failed to demonstrate some justification for his six-year delay in seeking leave to move for a new trial based on that evidence. We cannot say that the court, in denying leave on that basis, abused its discretion.

{¶8} Crim.R. 33(B) does not prescribe the time within which a motion for leave must be filed after the movant has learned of the proposed ground for a new trial. But the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Appellate Districts require the filing of a Crim.R. 33(B) motion within a reasonable time after the evidence supporting that ground was discovered. *See State v. Seal*, 4th Dist. Highland No. 16CA14, 2017-Ohio-116, ¶ 12-14; *State v. Brown*, 186 Ohio App.3d 309, 927 N.E.2d 1133, ¶ 24 (7th Dist.2010); *State v. Cleveland*, 9th Dist. Lorain No. 08CA009406, 2009-Ohio-397, ¶ 49; *State v. Willis*, 6th Dist. Lucas No. L-06-1244, 2007-Ohio-3959, ¶ 20-23; *State v. Berry*, 10th Dist. Franklin No. 06AP-

803, 2007-Ohio-2244, ¶ 27-29; *State v. Valentine*, 11th Dist. Portage No. 2002-P-0052, 2003-Ohio-2838, ¶ 9; *State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001 WL 332019, *3-4 (Apr. 6, 2001); *State v. Barnes*, 12th Dist. Clermont No. CA99-06-057, 1999 WL 1271665, *3 (Dec. 30, 1999); *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063, *3 (Oct. 9, 1997). Those courts found that a reasonable-time requirement is permitted as not inconsistent with the criminal rules, *see Crim.R. 57(B)*, and advances the stated objectives of those rules in securing the speedy and sure administration of justice and in eliminating unjustifiable delay, *see Crim.R. 1(B)*, by discouraging a defendant from waiting to move for leave while the evidence against him dissipates or disappears. *See Seal* at ¶ 12; *Barnes* at *3; *Stansberry* at *3. No appellate district has refused to impose a reasonable-time requirement.

{¶9} Here, we join our sister appellate districts in holding that even if the defendant has demonstrated that he could not have learned of the proposed ground for a new trial within the prescribed period, a court has the discretion to deny leave to move for a new trial, when the defendant has delayed moving for leave after discovering the evidence supporting that ground, and that delay was neither adequately explained nor reasonable under the circumstances. *See Seal* at ¶ 12; *York* at *3-4; *Stansberry* at *3. We conclude that the common pleas court did not abuse its discretion in determining that Thomas's filing delay was unreasonable.

{¶10} Thomas waited to file his Crim.R. 33(B) motion for over six years after receiving the evidence on which his actual-innocence claim depended. The motion was supported by that evidence, the Ohio Public Defender's December 2008 letter agreeing to send the evidence, and Thomas's own affidavit attesting to his receipt of

OHIO FIRST DISTRICT COURT OF APPEALS

the evidence in 2009. He did not offer in his affidavit any explanation for his delay in moving for a new trial based on that evidence. Nor does the record otherwise demonstrate circumstances that might be said to justify that delay. *See, e.g., Seal* at ¶ 13 (finding unreasonable a two-and-one-half year filing delay from the time when defendant “knew of [his] arguments”); *Barnes* at *3 (finding unreasonable a five-year filing delay to procure affidavits “unnecessary” to the motion for leave); *Stansberry* at *3 (finding unreasonable a three-year filing delay after the evidence was “available” to defendant).

{¶11} Because the common pleas court did not abuse its discretion in determining that Thomas's delay in filing his Crim.R. 33(B) motion was unreasonable, we hold that the court did not abuse its discretion in overruling the motion on that basis. Accordingly, we overrule the first assignment of error and affirm the court's judgment.

Judgment affirmed.

MOCK, P.J., and DETERS, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.