

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-474
v.	:	(C.P.C. No. 99CR-08-4368)
	:	
Chad E. West,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Chad E. West, pro se.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Chad E. West ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas overruling appellant's motion for a new trial. Because the trial court did not abuse its discretion, we affirm that judgment.

{¶2} On August 13, 1999, appellant was indicted by a Franklin County Grand Jury for one count of rape, one count of kidnapping, one count of burglary, and one count of gross sexual imposition regarding a 13-year-old boy. The prosecutor dismissed the charge of gross sexual imposition prior to trial. A jury found appellant guilty of the remaining counts. Appellant appealed the sentence that was imposed. This court agreed with appellant that the trial court erred in imposing the sentence and reversed and

remanded for re-sentencing. On July 9, 2003, appellant filed a motion for leave to file a motion for a new trial. The trial court denied appellant's motion and this court affirmed that decision. *State v. West*, 10th Dist No. 04AP-977, 2005-Ohio-2300.

{¶3} On December 15, 2008, appellant filed a second motion seeking a new trial pursuant to Crim.R. 33. The trial court denied appellant's motion for new trial, concluding that appellant failed to present newly discovered evidence that would support granting a new trial.

{¶4} Appellant appeals and assigns the following two assignments of error:

1. The trial court abused its discretion in denying defendant's motion in request for a new trial, without ordering an evidentiary hearing, when defendant demonstrated by more than a preponderance of the evidence that "Brady" material was withheld prior to and throughout the trial.
2. The trial court had erred [sic] to the defendant's prejudice by denying defendant's motion, as defendant has met the burden of proof by a preponderance of the evidence that he is entitled to a new trial.

{¶5} Appellant's assignments of error are interrelated, as they all relate to the denial of his motion for leave to file a motion for a new trial. For this reason, the assignments of error will be addressed together.

{¶6} Motions for a new trial in criminal cases are governed by Crim.R. 33(B), which provides, in relevant 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.

{¶7} Thus, Crim.R. 33(B) contemplates a two-step procedure when a defendant seeks to file a motion for new trial more than 120 days after the conclusion of the trial. In the first step, the defendant must demonstrate that he was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial. If the defendant provides documents that on their face support the defendant's claim that discovery of the evidence was unavoidably delayed, the trial court must hold a hearing to determine whether there is clear and convincing evidence of unavoidable delay. *State v. Wright* (1990), 67 Ohio App.3d 827; *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181.

{¶8} The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶9} A trial court's decision whether to grant leave to file an untimely motion for new trial is subject to review for abuse of discretion. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518. Abuse of discretion means more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Because appellant was required to prove unavoidable delay, we must review the record to determine whether the trial court had before it sufficient evidence to meet appellant's burden. *Townsend*, ¶7.

{¶10} In support of his motion for leave to file an untimely motion for new trial, appellant offered a plethora of unauthenticated documents, which included: grand jury summary, police reports, witness statements, a letter from attorney Keith A. Yeazel dated

March 21, 2003, letters to and from the Grove City Police Department dated June 6 and June 13, 2007, respectively, three letters from the Ohio Innocence Project dated June 11, 2008, June 24, 2008, and July 1, 2008, and a letter from "Mom" dated November 20, 2008. Appellant claims the state and the police "withheld" these documents "and never disclosed [them] in discovery[.]" (Appellant's motion at 7.) He further asserts that these documents were "crucial for the defense in preparing [sic] for trial because contained in said documents is evidence that could have been used at trial to impeach the credibility and testimony of the [victim] and also prove he is a habitual liar who fabricated the entire allegation." *Id.*

{¶11} As we noted earlier, appellant was required to demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the evidence forming the basis for his motion for new trial within 120 days of the judgment of his conviction. "[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. Walden* (1984), 19 Ohio App.3d 141, 145-46. We find that appellant has failed to make such a showing.

{¶12} Here, appellant fails to explain how he was unavoidably prevented from discovering these grounds prior to the expiration of the deadline for filing a motion for new trial. Nor does appellant present any evidence that establishes these documents were actually withheld or that he learned of them only after the Crim.R. 33(A) filing deadline. Clear and convincing proof that a defendant was unavoidably prevented from filing " "requires more than a mere allegation that a defendant has been unavoidably

prevented from discovering the evidence he seeks to introduce as support for a new trial." ' ' " *State v. Carson*, 10th Dist. No. 07AP-492, 2007-Ohio-6382, ¶16, quoting *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶9, quoting *State v. Mathis* (1999), 134 Ohio App.3d 77, 79. Thus, the mere assertion in appellant's motion that he was unavoidably prevented from discovering these documents was not sufficient on its face to carry appellant's burden of proving unavoidable delay by clear and convincing evidence. See *State v. Bush*, 10th Dist. No. 08AP-627, 2009-Ohio-441; *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178.

{¶13} Succinctly stated, assuming without deciding that these documents actually constitute "evidence," appellant has failed to sufficiently explain or demonstrate the delay in coming forward with the same, and no other evidentiary materials were provided that set forth any efforts to obtain this information at an earlier date, or why appellant could not have obtained these documents through a diligent pretrial investigation. *Bush*, supra. Consequently, the trial court did not abuse its discretion when it denied appellant's motion without holding an evidentiary hearing. Accordingly, appellant's two assignments of error are overruled.

{¶14} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.
