

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

REGINALD K. EVERSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY

Case No. 26 MA 0033

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2008 CR 00429

BEFORE:

Katelyn Dickey, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. D. Andrew Wilson, Ohio Attorney General, and *Atty. Drew E. Wood*, Special Prosecuting Attorney, Assistant Attorney General, for Plaintiff-Appellee and

Atty. Joseph C. Patituce, Patituce & Associates, LLC, for Defendant-Appellant.

Dated: October 14, 2026

DICKEY, J.

{¶1} Appellant, Reginald K. Everson, appeals the March 3, 2026 judgment entry of the Mahoning County Court of Common Pleas: (1) reconsidering its July 29, 2024 judgment entry sustaining his motion for an evidentiary hearing on his motion for leave to file a motion for new trial pursuant to Criminal Rule 33 (“original judgment entry”); and (2) overruling his motion for leave to file a motion for new trial (“motion for leave”).

{¶2} The motion for leave and a contemporaneously-filed successive petition for postconviction relief (“successive petition”) were both predicated on the same grounds and the same evidence. The first ground was the recantation of trial testimony provided by state’s witness Mickele Glenn. At trial, Glenn provided eyewitness testimony identifying Appellant as the gunman in the fatal drive-by shooting of eighteen-year-old Terrell Roland. Next, Appellant alleged he had an alibi witness, Erica Moore, who could account for his whereabouts on the day and time when Roland was murdered. Finally, Appellant alleged the prosecution offered false testimony regarding out-of-court statements made by Appellant’s uncle, Marlan Everson. Notably, the state’s testimony at trial regarding out-of-court statements were attributed to Appellant’s uncle, Marion Everson. However, Marion and Marlan Everson appear to be the same person. Appellant’s affidavit, as well as the affidavits of Glenn, Moore, and Marlan Everson were attached to both pleadings.

{¶3} Appellant advanced two assignments of error in this appeal, but he withdrew his first assignment of error, asserting the original judgment entry was a final order at oral argument. Consequently, the sole issue before us is whether the trial court abused its discretion in overruling the motion for leave. Finding no reversible error, the judgment entry of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶4} On March 30, 2008, Glenn was sitting with Roland in the driveway outside his mother’s home at 117 East Avondale in Youngstown, Mahoning County, Ohio, when Roland was fatally shot by an occupant of a black vehicle driving past the East Avondale address. Glenn ran inside the house and told Roland’s mother about the shooting. She ran to Roland’s side, where Roland told her that “Reg shot [him],” and then asked her to

call 911. Roland subsequently lost consciousness and was unresponsive when police arrived. He died later that evening at the hospital.

{¶5} Youngstown Police Officers Kelly Lamb and Robert DiMaiolo were two of the officers who responded to the shooting. Officer Lamb determined that Glenn had witnessed the shooting and she placed him in Officer DiMaiolo's cruiser. Glenn initially stated that he had not seen the crime, but later admitted he was a witness after being placed in the police cruiser. He identified the shooter as a man he knew named "Reg," and he gave a description of the car used in the shooting: a black, four-door Buick Regal. Although Glenn did not know Reg's last name, Glenn told Officer DiMaiolo that Reg lived at 114 West Chalmers Avenue in Youngstown. Officer DiMaiolo took Glenn to the police station for further questioning and asked Officer Michael Quinn to investigate the 114 West Chalmers Avenue address. Officer Quinn went to the location and spoke with Marion Everson, who stated that Appellant lived with him and had access to a black Buick Regal. (6/25/12 Trial Tr., p. 466, 472).

{¶6} It was later determined that Glenn and Roland were friends, and they both knew Appellant. On the afternoon of the shooting, Glenn was at the 117 East Avondale address for a haircut. He was wearing a bulletproof vest and was carrying a firearm because of a feud between him and one of Appellant's cousins. Glenn was standing outside the house in the driveway and Roland was sitting next to him when a black Buick Regal drove up to the house and stopped. Gunshots were fired from the vehicle and hit Roland. (*Id.*, p. 342-349). Glenn recognized the shooter as "Reg" and identified him as the only occupant in the vehicle. Glenn later selected Appellant from a photo array as the person who shot Roland. (*Id.*, p. 347, 354-357).

{¶7} A Mahoning County Grand Jury indicted Appellant on one count of aggravated murder, a first-degree felony in violation of R.C. 2903.01(A)(F), with an accompanying specification, and having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13(A)(2)(b). The matter was bifurcated and proceeded to a jury trial on the aggravated murder charge and accompanying specification. The jury found Appellant guilty. The trial court then held a bench trial on the having a weapon while under disability charge and found Appellant guilty. The trial court sentenced Appellant to 30 years to life for aggravated murder, five years for the firearm specification,

and three years for having a weapon while under disability, to be served consecutively for a total sentence of 38 years to life.

{¶18} Appellant filed his direct appeal on July 11, 2012. We affirmed Appellant's convictions for aggravated murder and the gun specification, but reversed his conviction for having a weapon while under a disability finding that Appellant never waived his right to a jury trial on that charge. *State v. Everson*, 2016-Ohio-87 (7th Dist.).

{¶19} Appellant, acting pro se, filed a petition for postconviction relief on July 12, 2013, claiming ineffective assistance of trial counsel. He also filed two amended petitions to which he attached the affidavit of alleged witness Carlos Valentin. According to his affidavit, Valentin stated that on the day of the murder, he saw Glenn and Roland standing in Roland's driveway. When Valentin went inside his own house, he heard gunshots. Valentin looked outside and saw Glenn standing over Roland pointing a gun at him, then Glenn fled. Valentin further averred he told the prosecutor what he witnessed and that the prosecutor tried to convince him to say that he saw Appellant or a black car at the time of the shooting. According to Valentin, the prosecutor offered him judicial release if he would testify that he saw Appellant or a black car in the area at the time of the shooting. Finally, Valentin averred he told the same information to defense counsel, but defense counsel never contacted him to testify.

{¶10} The trial court denied Appellant's petition without considering his amended petitions, and found Appellant's pleadings and affidavit failed to demonstrate that trial counsel was ineffective. On appeal, we reversed and remanded the matter. *State v. Everson*, 2016-Ohio-3419 (7th Dist.), appeal not allowed, 2016-Ohio-5585. We found the trial court erred in ruling on Appellant's petition without considering the two amended petitions that included Valentin's affidavits. *Id.* at ¶ 35. We instructed the trial court on remand to consider Appellant's two amended postconviction petitions and to issue findings of fact and conclusions of law regarding the amended petitions. *Id.*

{¶11} On remand, the state filed a motion for summary judgment asserting Appellant failed to present competent, credible evidence that his trial counsel was ineffective. The state attached a transcript of a prior proffer by Valentin that contradicted his affidavit. The state also attached the affidavit of prosecuting attorney Martin Desmond. Appellant did not file a response to this motion.

{¶12} The trial court found Valentin's affidavit lacked credibility based upon Valentin's earlier proffer and Prosecutor Desmond's affidavit. Therefore, the court found Appellant failed to support his postconviction petition with competent, credible evidence dehors the record to warrant postconviction relief. Consequently, the trial court granted the state's motion for summary judgment and dismissed Appellant's postconviction petition.

{¶13} In Appellant's second appeal of the denial of his original petition for postconviction relief, we found the trial court acted within its discretion in finding Valentin's affidavit lacked credibility based on numerous inconsistencies between his affidavit and his proffer to the prosecutor. We further found no violation of *Brady v. Maryland*, 373 U.S. 83 (1963), as Valentin conceded he shared the substance of his affidavit with defense counsel prior to the trial. It is important to note that Valentin refused to testify at trial, so the prosecutor opposed judicial release and Valentin returned to the penitentiary. *State v. Everson*, 2017-Ohio-898 (7th Dist.).

{¶14} On November 25, 2019, Appellant filed a motion for leave to file a motion for new trial pursuant to Criminal Rule 33 and a request for an evidentiary hearing. On November 27, 2019, Appellant filed a pro se motion for a new trial and a request for an evidentiary hearing. On December 2, 2019, Appellant filed a pro se motion to file a successive petition for postconviction relief. On December 6, 2019, he filed the pro se successive petition and a pro se memorandum in support of his motion and petition to demonstrate he was unavoidably prevented from discovering the substance of the Glenn affidavit within the respective time limitations. On March 2, 2020, the state filed both its response to the motion for leave and a motion for judgment on the pleadings on the successive petition. On March 17, 2020, Appellant filed both a motion to strike the motion for judgment on the pleadings and an opposition brief to the state's responses.

{¶15} Four months later on July 31, 2020, an attorney appearance was filed on behalf of Appellant. Roughly three years later on March 31, 2023, trial counsel filed a motion for an evidentiary hearing.

{¶16} According to Appellant's affidavit, Glenn contacted Appellant's cousin to inform him that Glenn wanted to recant his trial testimony. Appellant's cousin relayed the information to another cousin, who requested Glenn contact Appellant's attorney.

Richard Robinson, a third family member, received a copy of the Glenn affidavit on August 21, 2019 and forwarded a copy to Appellant, which Appellant received on August 28, 2019. No date is provided for Glenn’s initial contact with Appellant’s cousin and no timeline is provided regarding the various steps leading to the making of the Glenn affidavit.

{¶17} Appellant explained he was unaware of Glenn’s desire to recant his testimony because Appellant believed he was prohibited from contacting any of the state’s witnesses. Appellant attempted to contact Glenn prior to the trial, but was admonished by defense counsel because Glenn told the trial court that he was being harassed by Appellant. Defense counsel explained to Appellant that he could be charged with intimidation if he contacted a witness for the state. Appellant mistakenly believed the prohibition continued even after the trial was concluded.

{¶18} At trial, Glenn identified Appellant as the perpetrator. However, in his affidavit, Glenn recants his eyewitness identification of Appellant. Glenn concedes he “recognized the Buick Regal as being the motor vehicle which [Appellant] sometimes drove.” (Affidavit of Mickle Glenn, ¶ 5). However, Glenn denies seeing Appellant driving the vehicle or firing the shots. (*Id.* at ¶ 7).

{¶19} According to Glenn’s affidavit, the prosecutor threatened to charge Glenn with the fatal shooting if Glenn did not testify that he saw Appellant driving the vehicle. (*Id.* at ¶ 9). Glenn writes, “I testified at [Appellant’s] trial that I saw [Appellant] driving the Buick Regal because I feared I would be charged with murder. My testimony that I saw [Appellant] operating the Buick Regal was false and [Prosecutor Desmond] knew my testimony was false.” (*Id.*). Glenn’s affidavit provides no timeline of events leading to his recantation.

{¶20} On January 18, 2024, roughly six months prior to the issuance of the original judgment entry, the Ohio Supreme Court issued its decision in *State v. Johnson*, 2024-Ohio-134. Because the pleadings were filed in 2019, there was no mention of *Johnson*.

{¶21} In *Johnson*, the petition was predicated upon an affidavit of a recanting witness. The affidavit was executed after the expiration of the postconviction petition deadline. The Ohio Supreme Court held the date of the affidavit alone was insufficient to

show the petitioner was unavoidably prevented from discovering the substance of the affidavit prior to the expiration of the time limitation. The Court reasoned:

[The date of the affidavit] merely reveals when the affidavit was executed or provided, not when the testimony it contains became available. Without an explanation of how the recantation was discovered, the information essential to the R.C. 2953.23 inquiry remains cloaked in darkness. It is this type of information that bears on the petitioner's ability to avoid delay in discovering recanted testimony.

Id. at ¶ 25.

{¶22} Moreover, the Ohio Supreme Court construed the phrase “unavoidably prevented” to mean “incapable of being avoided or evaded,” in the context of an untimely or successive petition. *Id.* at ¶ 23-24. Of equal import, the Court opined a hearing need not be scheduled to allow a petitioner to flesh out the facts establishing he was unavoidably prevented from discovery, reasoning “[i]f testimony can be elicited at a hearing, it can be attested to in an affidavit.” *Id.* at ¶ 26. The Court recognized the “unavoidably prevented” requirement is jurisdictional with respect to untimely and successive petitions. *Id.* “Remember, the petitioner bears the burden of proving that he was unavoidably prevented from discovering the evidence on which he must rely, before the trial court even has subject-matter jurisdiction to consider the petition. See R.C. 2953.23(A)(1); [*State v.*] *Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, at ¶ 24, 36, 38. Therefore, it is the petitioner's duty to present sufficient evidence to carry that burden at the time he files the petition.” *Id.*

{¶23} On July 19, 2024, ten days before granting the motion for an evidentiary hearing on the motion for leave, the trial court dismissed Appellant’s successive petition. In dismissing the successive petition, the trial court opined Appellant provided a “plausible argument” that he was unavoidably prevented from discovering Glenn’s recantation of his trial testimony within the time limitation (three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction). However, the trial court dismissed the petition as Appellant failed to show

by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have convicted Appellant. Despite the fact that *Johnson* was a postconviction case, which interpreted the “unavoidably prevented” language in the postconviction statute, the trial court did not consider it.

{¶24} With respect to the Moore and Marlan Everson affidavits, the trial court opined:

Moore stated in her affidavit that she was with [Appellant] on the day of the Roland murder; thus, assuming this statement is true, [Appellant] was likewise aware of this information. (Erica Moore’s affidavit, ¶ 7). Furthermore, Appellant’s trial counsel was aware of this information because they filed a Notice of Alibi in which they set forth this information.

Thus, [Appellant] was not “unavoidably prevented” from discovering the facts contained in Erica Moore’s affidavit.

Likewise, Defendant was not “unavoidably prevented” from discovering the facts contained in Marlan Everson’s affidavit because [Appellant’s] counsel was aware of Marlan Everson’s purported allegation that he never spoke with Youngstown Police in regards to the Roland murder. Trial counsel was aware of Marlan Everson before trial, and chose not to secure his appearance. (Trial Tr. p. 612-615). Thus, [Appellant] was not “unavoidably prevented” from discovering the facts contained in Marlan Everson’s affidavit.

(7/19/24 J.E., p. 8-9).

{¶25} On July 29, 2024, the trial court concluded Appellant was entitled to an evidentiary hearing on his motion for leave. The trial court found Appellant was not unavoidably prevented from discovering the substance of the Moore and Marlan Everson affidavits because Appellant conceded in his affidavit that he was aware of the information prior to trial. With respect to the Glenn affidavit, the trial court found “[d]efendant is . . . entitled to a hearing on his [motion for leave] so we can determine whether he had

established by clear and convincing evidence whether he was unavoidably prevented from discovering the information in [the affidavit of Mickele Glenn] within 120 days of the jury's verdict." (7/29/24 J.E., p. 4).

{¶26} Appellant filed a timely appeal of the dismissal of the successive petition based solely on the substance of the Glenn affidavit. On July 25, 2025, we issued our Opinion and Judgment Entry affirming the trial court's dismissal of Appellant's successive petition in *State v. Everson*, 2025-Ohio-2628 (7th Dist.), appeal not allowed, 2025-Ohio-5220 ("*Everson* decision"). With respect to the Glenn affidavit, we opined:

According to Appellant's affidavit, Glenn contacted Appellant's cousin to inform him that Glenn wanted to recant his trial testimony. Appellant's cousin relayed the information to another cousin, who requested that Glenn contact Appellant's attorney. Richard Robinson, a third family member, received a copy of the Glenn affidavit on August 21, 2019 and forwarded a copy to Appellant, which Appellant received on August 28, 2019. No date is provided for Glenn's initial contact with Appellant's cousin and no timeline is provided regarding the various steps leading to the making of the Glenn affidavit.

Appellant explained he was unaware of Glenn's desire to recant his testimony because Appellant believed he was prohibited from contacting any of the state's witnesses. Appellant attempted to contact Glenn prior to the trial, but was admonished by defense counsel because Glenn told the trial court that he was being harassed by Appellant. Defense counsel explained to Appellant that he could be charged with intimidation if he contacted a witness for the state. Appellant mistakenly believed the prohibition continued even after the trial was concluded.

. . .

Appellant challenges the trial court's conclusions with respect to both factual findings required for a trial court to exercise jurisdiction over a successive petition. First, Appellant argues he was unavoidably prevented

from discovering the substance of the Glenn affidavit within the year following Appellant's conviction. Second, Appellant contends the Glenn affidavit demonstrates by clear and convincing evidence that a reasonable factfinder would not have entered a guilty verdict but for constitutional error at trial, that is, Glenn's eyewitness identification of the Appellant as the perpetrator.

In [*State v.*] *Johnson*, 2024-Ohio-134, the defendant was convicted in 2013. He filed his third postconviction petition in 2020. The only evidence that Johnson submitted in support of his successive petition was an affidavit from the recanting witness, who was also the victim. *Id.* at ¶ 28. In his affidavit, the victim detailed his “doubts” about his trial testimony, his limited recollection of his assailant (he was rendered unconscious by several gunshots), and his concern that he had improperly identified Johnson as his attacker. *Id.* at ¶ 7. The victim also explained he had “felt pressured by [a police detective] to . . . testify against [Johnson] even though [he] wasn't sure [Johnson] was the person who committed these crimes against [him].” *Id.*

The affidavit contained no information about when or how Johnson learned of the victim's misgivings regarding his identification, who contacted whom, when such contact occurred or any other information “about whether Johnson had been prevented, unavoidably or otherwise, from timely discovering [the victim's] uncertainties about his identification of Johnson.” *Id.* at ¶ 28-29. Further, the victim claimed in his affidavit that he had “spent the past seven years thinking about [his] testimony” and that he had daily “felt an incredible weight on [his] shoulders” because he believed he did not identify the right person. *Id.* at ¶ 29. Based on the forgoing facts, the Ohio Supreme Court held Johnson did not carry his burden of showing that he was unavoidably prevented from discovering the recantation within the statutory deadline. *Id.* at ¶ 8-30, 35.

Appellant's affidavit contains a narrative of the events leading to the making of Glenn's affidavit. However, no dates are provided regarding the timeline beginning with Glenn's desire to recant and culminating in the making of his affidavit. While the date that Appellant received Glenn's affidavit is clear, it is impossible to determine whether he was "unavoidably prevented" from timely discovering Glenn's desire to recant his testimony.

The trial court found Appellant's affidavit supplied a "plausible" explanation that Appellant was unavoidably prevented from discovering the information provided in the Glenn affidavit. However, the Ohio Supreme Court in *Johnson* establishes Appellant's burden of proof with respect to the trial court's jurisdiction to consider a second postconviction petition requires more than a plausible explanation. Accordingly, we find Appellant's affidavit fails to establish that he was "unavoidably prevented" from timely discovering Glenn's desire to recant his trial testimony.

State v. Everson, 2025-Ohio-2628, ¶¶ 25-26, 45-49 (7th Dist.), appeal not allowed, 2025-Ohio-5220.

{¶27} While the appeal of the dismissal of Appellant's successive petition was pending, the trial court did not conduct the evidentiary hearing on the motion for leave. After our opinion and judgment entry on the successive petition was released, the state filed a motion to reconsider and/or vacate order granting hearing on motion for leave on February 5, 2026. The state argued our decision affirming the dismissal of Appellant's successive petition, more specifically our finding Appellant's affidavit was insufficient to establish he was unavoidably prevented from discovering the substance of the Glenn affidavit within the prescribed time limitation for a motion for new trial, was the law of the case.

{¶28} The trial court granted the state's motion for reconsideration and dismissed the motion for leave on March 3, 2026, reasoning "this court may only address a motion for new trial in this matter where the defendant shows he was 'unavoidably prevented' from discovering the new evidence, and the Court of Appeals has held it is impossible to

make that determination based on the affidavit submitted. . .” (3/3/2026, J.E., p. 1-2). Appellant filed his opposition brief on March 4, 2026.

{¶29} This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN GRANTING THE STATE OF OHIO’S MOTION TO RECONSIDER BECAUSE THE [ORIGINAL JUDGMENT ENTRY] WAS A VALID FINAL ORDER, THE STATE OF OHIO FAILED TO APPEAL THAT ORDER, AND THE STATE OF OHIO HAD AGREED THE HEARING WAS PROPER.

{¶30} At oral argument, Appellant’s counsel withdrew the first assignment of error.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING [APPELLANT’S] MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL.

{¶31} A motion for new trial based on newly discovered evidence must be filed within one-hundred-and-twenty days of the verdict. In order to file a motion for new trial beyond the one-hundred-and-twenty-day time limitation specified in Crim.R. 33(B), a defendant must first seek leave of the trial court to file a delayed motion. Further, “until a trial court grants leave to file a motion for a new trial, the motion for a new trial is not properly before the court.” *State v. Bethel*, 2022-Ohio-783, at ¶ 41, citing *State v. Brown*, 2011-Ohio-1080, ¶ 14 (8th Dist.). “The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial.” *State v. Hatton*, 2022-Ohio-3991, ¶ 30.

{¶32} Relevant to this appeal, a trial court may sustain a motion for leave to file an untimely motion for new trial based on newly-discovered evidence, “[i]f 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.” Crim.R. 33(B). The defendant must have had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence. *State v. Lordi*, 2002-Ohio-5517, ¶ 26 (7th Dist.).

{¶33} A brief comparison of the criminal rule and the postconviction statute informs our decision. A motion for leave to file a motion for new trial and a successive petition both require the defendant/petitioner to show he was “unavoidably prevented” from discovering the substance of the supporting affidavit. However, for the purposes of a motion for leave, the defendant must produce clear and convincing evidence that he was unavoidably prevented, whereas the statute governing successive petitions does not provide the evidentiary standard. Next, the evidentiary requirements for a successive petition are jurisdictional. In other words, without the required evidence, a trial court is without jurisdiction to entertain the motion. Most significantly for the purposes of this appeal, the motion for leave and successive petition have different time limitations. For a motion for leave, a defendant must show he was unavoidably prevented from discovering the substance of the supporting affidavit within one-hundred-and-twenty days following the verdict. For a successive petition, a petitioner must show he was unavoidably prevented from discovering the substance of the supporting affidavit within three-hundred-sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.

{¶34} This appeal turns on the distinction, if any, between the “unavoidably prevented” requirement in the criminal rule governing a motion for leave and the same requirement for an untimely or successive petition in the statute. The Ohio Supreme Court has acknowledged the “unavoidably prevented” requirement in the successive petition statute “mirrors” the identically-worded requirement in the criminal rule. *State v. Bethel*, 2022-Ohio-783, ¶ 59. Both the Eighth and Twelfth Districts have uniformly applied the “unavoidably prevented” requirement, despite various other distinctions in the criminal rule and statute. *State v. Jones*, 2026-Ohio-1455, ¶ 78 (8th Dist.) (“We are therefore required to apply the ‘unavoidably prevented’ analysis in the Crim.R. 33(B) context just as in the postconviction-relief context. [*State v.*] *Allen*, 2024-Ohio-970, at ¶ 33 (8th Dist.), citing *Bethel* at ¶ 59.”); *State v. Birt*, 2026-Ohio-2224, ¶ 28 (12th Dist.), citing *Allen*, *supra*.

{¶35} Finally, “[t]he law of the case doctrine is rooted in principles of res judicata and issue preclusion.” *State v. Amos*, 2024-Ohio-2939, ¶ 28 (7th Dist.). “ ‘[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels’ and a trial court cannot disregard the superior court’s ruling absent extraordinary circumstances.” *Id.*, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984).

{¶36} A reviewing court shall not disturb a trial court’s decision granting or denying a Crim.R. 33(B) motion for leave to file a delayed motion for new trial absent an abuse of discretion. *State v. McNeal*, 2022-Ohio-2703, ¶ 13. An abuse of discretion occurs when a court exercises its judgment “in an unwarranted way, in regard to a matter over which it has discretionary authority.” *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. We apply a de novo standard of review in determining whether a court properly applied the law of the case doctrine. *Oliver v. Groedel*, 2023-Ohio-275, ¶ 40 (7th Dist.), citing *Giancola v. Azem*, 2018-Ohio-1694, ¶ 13.

{¶37} Appellant argues his affidavit establishes by clear and convincing evidence that he was unavoidably prevented from discovering the substance of the Moore, Marlan Everson, and Glenn affidavits prior to the expiration of the one-hundred-and-twenty-day time limitation for a motion for new trial. He further argues the distinct time limitations, which distinguish the motion for leave and a successive petition, prohibit the application of the law of the case doctrine. While we agree the law of the case doctrine should not apply universally with respect to motions for leave and successive petitions, given the distinctions in the criminal rule and postconviction statute, we find the facts in this case and our legal conclusion in the *Everson* decision resolve this appeal as a matter of law.

{¶38} In sustaining the motion for reconsideration and dismissing the motion for leave, the trial court addressed the impact of the *Everson* decision based only on the Glenn affidavit, as Appellant did not appeal the trial court’s decision dismissing the successive petition based on the Moore and Marlan Everson affidavits. The July 19, 2024 judgment entry dismissing the successive petition reads in relevant part:

Moore stated in her affidavit that she was with [Appellant] on the day of the Roland murder; thus, assuming this statement is true, [Appellant] was likewise aware of this information. (Erica Moore’s affidavit, ¶ 7).

Furthermore, Appellant's trial counsel was aware of this information because they filed a Notice of Alibi in which they set forth this information.

Thus, [Appellant] was not "unavoidably prevented" from discovering the facts contained in Erica Moore's affidavit.

Likewise, Defendant was not "unavoidably prevented" from discovering the facts contained in Marlan Everson's affidavit because [Appellant's] counsel was aware of Marlan Everson's purported allegation that he never spoke with Youngstown Police in regards to the Roland murder. Trial counsel was aware of Marlan Everson before trial, and chose not to secure his appearance. (Trial Tr. p. 612-615). Thus, [Appellant] was not "unavoidably prevented" from discovering the facts contained in Marlan Everson's affidavit.

(7/19/24 J.E., p. 8-9).

{¶39} The pleadings and excerpts cited by the trial court in the July 19, 2024 judgment entry dismissing the successive petition support the conclusion that Appellant was aware of the substance of the two affidavits prior to trial. Therefore, the record establishes Appellant was not "unavoidably prevented" from discovering the substance of the Moore and Marlan Everson affidavits.

{¶40} Turning to the Glenn affidavit, we recognized in the *Everson* decision that no dates are provided in Appellant's affidavit regarding the timeline beginning with Glenn's desire to recant and culminating in the making of his affidavit. We concluded, "[w]hile the date that Appellant received Glenn's affidavit is clear, it is impossible to determine whether he was 'unavoidably prevented' from timely discovering Glenn's desire to recant his testimony." *Everson*, 2025-Ohio-2628, at ¶ 48 (7th Dist.).

{¶41} Although the time limitation for a motion for leave, one-hundred-and-twenty days after the verdict, is substantially shorter than a successive petition, we find nonetheless that the trial court would have to engage in an inference in order to conclude Appellant satisfied the "unavoidably prevented" requirement. While it would be easier to infer the events leading to Appellant's receipt of the Glenn affidavit occurred after the

expiration of the time limitation for a motion for leave, no inference should be necessary. Pursuant to *Johnson*, a defendant must establish by clear and convincing evidence that his untimely filing of a motion for new trial was “incapable of being avoided or evaded.” In the *Everson* decision, we concluded Appellant’s affidavit failed to satisfy that evidentiary burden, accordingly we find our legal conclusion with respect to the Glenn affidavit applies with equal force to the timeliness of the motion for leave.

{¶42} Earlier this year in *State v. Birt*, 2026-Ohio-2224 (12th Dist.), the Twelfth District opined a determination by a trial court in a successive petition is *not* a final order or the law of the case on a motion for new trial. However, the Twelfth District’s decision is distinguishable for several reasons. First, the Twelfth District characterized the trial court’s decision regarding the “unavoidably prevented” requirement as dicta. Next, the *Birt* decision was predicated on the fact that different affidavits were provided in support of the motion for new trial. Finally, the Twelfth District based its conclusion on the fact that the time limitations for a successive petition and a motion for new trial are distinct.

{¶43} Our conclusion that Appellant failed to demonstrate he was unavoidably prevented from discovering the substance of the Glenn affidavit prior to the expiration of the time limitation in the postconviction petition statute was not dicta, the affidavits offered in support of the motion for leave and the successive petition were identical, and we concluded Appellant’s affidavit did not establish a time line for his discovery of the substance of the Glenn affidavit. Based on the unique procedural facts in this case, as well as our conclusion in the *Everson* decision that it cannot be determined when Appellant learned of the substance of the Glenn affidavit, not that it fell outside the time limitation for a successive petition, we find the trial court correctly applied the law of the case doctrine and did not err in reconsidering the original judgment entry and dismissing the motion for leave.

{¶44} Accordingly, we find Appellant’s second assignment of error has no merit.

CONCLUSION

{¶45} For the foregoing reasons, the March 3, 2026 judgment entry of the Mahoning County Court of Common Pleas reconsidering its original judgment entry and overruling his motion for leave is affirmed.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the first assignment of error was withdrawn and the second assignment of error has no merit. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.