[Cite as *State v. Collins*, 2020-Ohio-918.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108486

v. :

SHAWN COLLINS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 12, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-06-488472-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Callista Plemel, Assistant Prosecuting Attorney, *for appellee*.

Kimberly Kendall Corral, *for appellant*.

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Shawn Collins, appeals from a judgment denying his motion for new trial without an evidentiary hearing. He raises three assignments of error for our review.

1. The court abused its discretion when it failed to grant a hearing based on the substantive claim of actual innocence.

2. The trial court abused its discretion in failing to grant leave to file a new trial based on newly discovered evidence.

3. The trial court abused its discretion not holding a hearing as required in a weighing of the [*State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999)] factors.

{¶ 2} Finding no merit to Collins's appeal, we affirm.

I. Procedural History and Factual Background

{¶ 3} In February 2007, a jury convicted Collins of three counts of aggravated robbery and one count of felonious assault, both with one- and three-year firearm specifications. The trial court sentenced Collins to a total of 23 years in prison. Collins directly appealed his convictions and sentence, raising 11 assignments of error. *See State v. Collins*, 8th Dist. Cuyahoga No. 89529, 2008-Ohio-578. This court overruled all of his assigned errors and affirmed his convictions and sentence. The Ohio Supreme Court did not accept his discretionary appeal. *State v. Collins*, 118 Ohio St.3d 1510, 2008-Ohio-3369, 889 N.E.2d 1027.

{¶ 4} This court set forth the following facts in *Collins*:

{¶ 5} The state presented testimony at a jury trial from Anthony Henderson, Gerald Henderson, Tenisha Murphy, Veronica Murphy, Shalonda White, and Cleveland Police Officer Terancita Jones Green.

{¶ 6} Anthony Henderson testified that on September 1, 2006, he and his cousin Gerald planned to visit Gerald's then-girlfriend, Tenisha Murphy. Murphy was not home, so they waited for her at the home of another friend, Shalonda White.

The boys sat on White's porch with several other individuals, while a group of 20 or 30 young men stood on a nearby corner. Murphy arrived home and joined the group on White's porch, and several of the boys from the corner came to talk to her. According to Anthony, Murphy subsequently left the scene, and an individual approached with two guns and demanded that Anthony and Gerald give him their belongings. The boys refused and the assailant began to slap them and struck Anthony in the head with his gun. Anthony then gave him $30, and Gerald gave him $10 and his cell phone, which was also a two-way radio. Kenneth Evans attempted to stop the gunman, but was unsuccessful. The gunman then asked if Anthony had a cell phone. Anthony indicated that he did not, and the gunman again struck him.

{¶ 7} After the gunman left the scene, the boys walked to Murphy's house to use her telephone. Gerald told Anthony that he had seen the assailant's face and knew who had robbed them. Another person from the larger group, who had braids, then confronted them and said, "You seen what?" Gerald replied that he had seen nothing, and the individual with braids then demanded that they strip. Murphy's mother then came out of her house, and the second assailant ran off. Murphy's mother agreed to take the boys home, but, as they started to leave, they noticed their cousin in the street and left the area in his vehicle. As they drove off, gunshots were fired.

{¶ 8} On cross-examination, Anthony admitted that he could not see the assailant and that, during the juvenile proceedings, he identified defendant as the

assailant because Gerald had identified defendant. He also stated that Murphy left the porch just before the gunman arrived.

{¶ 9} Gerald Henderson testified that they waited for Murphy at White's, and a bunch of boys were nearby on the corner. After Murphy arrived, Gerald and Anthony conversed on the porch with the girls and Gerald subsequently used the two-way radio function of his cell phone to contact his cousin for a ride home. An individual with two guns, identified at trial as defendant, then approached and demanded that Gerald and Anthony give him what they had in their pockets. At this time, Murphy fled to her home.

{¶ 10} According to Gerald, the assailant was dressed in black and his face was partially covered. Gerald's cousin then contacted him through the two-way radio, and the assailant grabbed this device from Gerald. He then struck the boys several times. Gerald further testified that another individual with braids approached, took one of defendant's guns and assisted defendant.

{¶ 11} After the two assailants left, Gerald and Anthony walked to Murphy's house to use the phone. Gerald stated that he knew who had robbed them, and the individual with braids then confronted them again, stating, "You seen what?" This second assailant then demanded that the boys strip. One of Anthony's friends named "Kenny" interceded, and the second assailant then left.

{¶ 12} On cross-examination, Gerald admitted that he initially could not identify defendant as the assailant, but he then stared at him and "visualized" what had happened.

{¶ 13} Murphy testified that she had previously dated defendant and had known him for approximately two years. Murphy said that she had seen Collins dressed in black on the day of the attack. Later, while she, White, and the Hendersons were conversing on White's porch, a group of 20 to 30 other young men were on a nearby corner. Murphy said that Collins came over to the porch three or four times and asked someone where Gerald and Anthony lived. A short time later, Murphy said that Collins came back to the porch with a scarf partially covering his face. She said that he produced two guns from his pocket and said, "You all ain't from around here," then demanded that they give him their belongings. Murphy ran from the porch and called the police.

{¶ 14} Murphy next observed Collins slapping Gerald and Anthony and taking their money. According to Murphy, Kenneth Evans approached and said, "Shawn, stop." Collins responded, "Don't say my name," and pointed the gun at Evans.

{¶ 15} On cross-examination, Murphy denied that she was testifying simply to get back at defendant. She acknowledged that, during the robbery, she recognized defendant by his voice.

{¶ 16} White testified that before the incident, she observed defendant wearing black pants and a black shirt. He was originally with the group of boys on the corner, but came over to the porch several times. The assailant then approached with a black scarf partially covering his face and robbed Gerald and Anthony. Shalonda fled with Tenisha, but the girls watched from across the street. According

to White, Kenneth Evans approached defendant during the incident and called him "Shawn."

{¶ 17} Veronica Murphy, Tenisha's mother, testified that, after the incident, she was going to take Gerald and Anthony home, but someone came to pick them up. As they drove off, Veronica Murphy heard gunshots.

{¶ 18} Cleveland Police Officer Terancita Jones Green testified that she is a school resource officer at Glenville High School and that White, Murphy, and Anthony attend this school. She further stated that Anthony told her about the incident, and she instructed him to fill out an incident report. She further stated that Anthony and one of the girls were afraid of retaliation from defendant's sister.

{¶ 19} The trial court denied defendant's motion for acquittal, and defendant presented testimony from Lashonda Barnett, Gregory Clayton, Chalina Hamilton, and Kenneth Lee Evans.

{¶ 20} Lashonda Barnett testified that defendant was wearing short pants and a white T-shirt, and the assailant was wearing long black pants, a dark hoodie, a red cap, and a black scarf. He robbed Gerald and Anthony, and a second person with braids confronted them a short time later. She acknowledged that Kennenth Evans was on the porch during the robbery. He said something to Anthony but Lashonda could not hear it.

{¶ 21} Gregory Clayton and Chalina Hamilton both testified that defendant was wearing short pants and a white T-shirt and was not the assailant. They also

stated that on the night of the incident, shots came from a car traveling on Irvington and did not come from the people gathered at or near White's porch.

{¶ 22} Kenneth Evans also testified that defendant was not dressed in black and was not the assailant. He stated that Murphy and White ran off when the gunman arrived. Evans did not know the gunman, but he acknowledged that he spoke to him and asked that he not "mess with" Anthony.

{¶ 23} Collins was subsequently convicted of three counts of aggravated robbery (Count 1 as to Gerald Henderson, and Counts 3 and 4 as to Anthony Henderson) and felonious assault (upon Anthony Henderson), plus the specifications.

{¶ 24} In March 2009, Collins filed a motion for leave to file a motion for new trial. He attached one affidavit to his motion from his codefendant, Trayvon Little. In his January 29, 2009 affidavit, Little averred that he alone committed the crimes against the two victims, and that Collins had nothing to do with it. The trial court denied Collins's motion without an evidentiary hearing.

{¶ 25} In November 2018, Collins filed a motion for new trial, which the trial court interpreted as his second motion for leave to file a motion for new trial. Attached to this motion, Collins attached four affidavits: (1) Tenisha Murphy, who recanted her trial testimony and stated that she never saw Collins at the scene of the robbery, (2) Dashun Rodgers and Raynell Collins, friends of Collins who claim to have been with Collins at the time of the aggravated robbery, and (3) Trayvon Little, Collins's codefendant who again averred that he committed the crimes alone.

A. The Four Affidavits

{¶ 26} Tenisha Murphy stated in her affidavit that she lied at trial because she was scared. She said that the police threatened her that if she did not testify against Collins they would arrest her. Murphy stated that she grew up in the same neighborhood and went to the same school as Collins, Little, and the Hendersons. She also grew up in the same neighborhood as "Kenny Evans." According to Murphy's affidavit, she did see Collins earlier in the day on the day of the aggravated robbery, but he was wearing a white shirt and blue shorts, not black.

{¶ 27} On the evening of September 1, 2006, Murphy said that she asked Anthony and Gerald Henderson to come to White's house. Murphy stated that she was sitting on White's front porch with White, Murphy's niece, and the Hendersons when "two boys approached from the street." Although one of the boys had a scarf over his face, Murphy recognized him as Trayvon Little "by his braids and his unmistakable shake." Murphy said that she thought the other boy might have been "Kenny Evans, but [she was] not positive." Murphy stated that as the two boys approached, "Trayvon pulled out a gun" and said to the Hendersons, "You all ain't from around here. Why you all over here?" The two boys "then made [the Hendersons] take their clothing off, took their money and I believe a phone before running to the corner" where there was a large group gathering. At that point, Murphy said she heard shooting coming from the direction of the large group but she did not see who was shooting. Murphy stated that she never saw Collins or Little

during the shooting. Murphy further averred that after Collins's trial, she confided to Collins's uncle that she lied at trial because she was "just young and scared."

{¶ 28} Dashun Rodgers averred that he was friends with Collins and had been with him on the night of the aggravated robbery. He had also grown up in the same neighborhood and attended the same school as Little. On the night of the aggravated robbery, Rodgers was with a group of about 12 people, including Collins and Little. Rodgers knew that Little had a gun that evening because he saw it on him. Rodgers remembered seeing Murphy, White, and "two young black males" on the porch. He did not know the two males. He further remembered seeing Little walk to White's porch with his gun "and jump the two males on the porch." Rodgers said that Collins stayed with the group and did not go "near the porch, pull a gun, or strike anyone."

{¶ 29} Raynell Collins (no relation to the defendant) testified that he knew Collins "personally" and played football with him. He also knew Little from the neighborhood. Raynell was with Collins, "Kenny Evans, Dashun Rodgers, and two or three other people" on the night of the aggravated robbery. Raynell remembered seeing "two black males" at Murphy's house. Raynell further remembered Little saying, "I am going to get those niggers" when he saw the males. Raynell said that no one in the group responded when Little said that. Raynell stated that "[t]here was no discussion or plan between anyone to participate in the robbery." Raynell averred that he did not want to see anyone get robbed, so he began walking away from the scene. Raynell then "ran towards [White's] porch when [he] heard Kenny

scream something that [he] couldn't understand, and [he] saw the two males who had been robbed." By the time he got there, Raynell did not see Little. Further, Raynell stated that he remembered Collins being with an unknown female at that time. Raynell said that he was never contacted by Collins's defense team.

B. Trial Court's Judgment Entry Denying Collins's Motion

{¶ 30} The trial court denied Collins's motion in an 11-page opinion without an evidentiary hearing. The trial court found that no matter what each witness said in his or her affidavit, Collins did not prove that he was unavoidably prevented from discovering these statements at the time of trial. Specifically, the trial court found that if Dashun Rodgers and Raynell Collins were with Collins at the time of the aggravated robbery, Collins could have obtained their statements at the time of trial. The trial court further found that Trayvon Little's affidavit mirrored his 2009 affidavit and thus, Collins's claim that Little's statement was new evidence was "disingenuous and without any justification."

{¶ 31} With respect to Tenisha Murphy, the trial court found that Murphy's affidavit was not credible. The trial court stated that it found Murphy's testimony at Collins's bindover hearing and his trial, that Collins was the perpetrator, was "the closest to the truth that Ms. Murphy ever presented." The trial court further found that Murphy's trial testimony "closely aligne[d] with the way multiple other witnesses" testified at trial. Plus, the trial court noted that trial testimony, including that of the two victims, Murphy, Kenneth Evans, and Shalonda White, established that Murphy left the porch "as the gunman was approaching and was therefore not

present at the time of the actual robbery." The trial court also did not believe Murphy's 2019 averment that police threatened her to get her to testify against Collins. The trial court found "more validity" to the fact that Collins's family and friends were threatening Murphy at the time of trial, noting that Murphy's mother testified at trial she ended up moving from the area where the robbery occurred due to the threats from Collins's family.

{¶ 32} It is from the trial court's denial of Collins's motion for leave to file a motion for new trial that he now appeals.

II. Motion for New Trial

{¶ 33} A motion for new trial based on newly discovered evidence must be filed within 120 days of a jury verdict unless the petitioner demonstrates by clear and convincing proof that he was unavoidably prevented from discovering the evidence upon which he must rely. Crim.R. 33(B). A party is "'unavoidably prevented"' from discovering evidence "'if the party had no knowledge of the existence of the grounds supporting the motion"' and could not have learned of that existence in the exercise of reasonable diligence within the time prescribed by the rule. *See State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 17, quoting *State v. Lee*, 10th Dist. Franklin No. 05AP-229, 2005-Ohio-6374, ¶ 7; *State v. Glover*, 8th Dist. Cuyahoga Nos. 102828, 102829, and 102831, 2016-Ohio-2833, ¶ 27.

{¶ 34} In order to file a motion for new trial based on evidence that was discovered beyond the 120 days prescribed in Crim.R. 33, a petitioner must first file

a motion for leave to file a delayed motion for new trial. In it, the petitioner must show by "clear and convincing proof that he [or she] has been unavoidably prevented from filing a motion in a timely fashion." *Id*. at ¶ 27, quoting *State v. Morgan*, 3d Dist. Shelby No. 17-05-26, 2006-Ohio-145, ¶ 9. Clear and convincing proof "is that measure or degree of proof [that] is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' * * * 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*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 35} In addition to showing an unavoidable delay in discovering the evidence, the petitioners must also show that they filed their motion for leave within a reasonable time after discovering the evidence. *Id*. at ¶ 18. Whether a delay is reasonable depends on the facts and circumstances surrounding the case and whether the petitioner has an adequate explanation for the delay. *Id*.

{¶ 36} With respect to whether the trial court should hold an evidentiary hearing on a motion for leave to file a motion for new trial, Ohio courts recognize that

> [a] trial court's decision "whether to conduct an evidentiary hearing on a motion for leave to file a motion for a new trial is discretionary and not mandatory." *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶ 54. A criminal defendant "is only entitled to a hearing on a motion for leave to file a motion for a new trial if he submits documents which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *Id*., citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 7, 869 N.E.2d 77 (2d Dist.). Thus, "no such hearing is required, and

> leave may be summarily denied, where neither the motion nor its supporting affidavits embody prima facie evidence of unavoidable delay." *State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893, ¶ 23.

State v. Ambartsoumov, 10th Dist. Franklin Nos. 12AP-878 and 12AP-877, 2013-Ohio-3011, ¶ 13.

{¶ 37} This court reviews the denial of leave to file an untimely motion for new trial for an abuse of discretion. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 13 (8th Dist.). We further review the decision on whether to hold a hearing on the motion for an abuse of discretion. *Id.* at ¶ 24. "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *In re C.K.*, 2d Dist. Montgomery No. 25728, 2013-Ohio-4513, ¶ 13, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985).

III. Actual Innocence

{¶ 38} In his first assignment of error, Collins argues that the trial court abused its discretion when it denied his motion without an evidentiary hearing because he presented evidence of actual innocence.

{¶ 39} "'Ohio courts have been consistent in holding that a claim of actual innocence is not itself a constitutional claim, nor does it establish a substantive ground for post[-]conviction relief.'" *State v. Davis*, 5th Dist. Licking No. 2008-CA-16, 2008-Ohio-6841, ¶ 138.

{¶ 40} This principle has been held applicable in cases involving motions for new trial where courts have recognized "the difficulty placed upon the state in

prosecuting a case once time has passed such as having to use stale evidence, contending with fading memories, and the dispersion of witnesses." *State v. Mack*, 8th Dist. Cuyahoga No. 75086, 1999 Ohio App. LEXIS 5063 (Oct. 28, 1999) (rejecting claim that motion for new trial should have been granted because newly discovered evidence established actual innocence; strength of appellant's newly discovered evidence, produced by defendant eight years after conviction, not high enough to warrant grant of new trial); *State v. Tolbert*, 1st Dist. Hamilton No. C-960944, 1997 Ohio App. LEXIS 5507 (Dec. 12, 1997) (denying motion for new trial based upon claim of actual innocence).

{¶ 41} Accordingly, we find no merit to Collins's contention that his claim of actual innocence warranted an evidentiary hearing simply because he claimed it. Collins's first assignment of error is overruled.

IV. Newly Discovered Evidence

{¶ 42} In his second assignment of error, Collins argues that the trial court abused its discretion when it denied his motion for leave to file a motion for new trial without an evidentiary hearing because he proved that he was unavoidably prevented from discovering his new evidence sooner. In this assigned error, the sole question before us is whether Collins's four affidavits, on their face, clearly and convincingly demonstrate that he was unavoidably prevented from timely discovering the evidence at issue.

{¶ 43} Collins argues that he was unavoidably prevented from discovering Raynell Collins's affidavit because Raynell was only a 15- or 16-year-old high school

boy who was too scared to come forward at the time of the crime. Collins claims that the fact that Raynell came forward now "as an adult with a fuller world view" is consistent "with what we know about human development."

{¶ 44} We disagree. Raynell averred that he was with the group of people apparently standing near White's porch on September 1, 2006. Raynell stated that he was with Collins, Kenneth Evans, Dashun Rodgers, and a few other people. Collins therefore knew that Raynell was present that evening. Collins could have compelled Raynell to testify by subpoena at his trial. Just because Raynell was young and did not come forward does not mean that Collins was unavoidably prevented from discovering this evidence.

{¶ 45} It is the duty of the criminal defendant and his trial counsel to make a serious effort, on their own, to discover potential, favorable evidence. *State v. Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, ¶ 9. Claims that evidence was undiscoverable simply because the defense did not take the necessary steps earlier to obtain the evidence do not satisfy the requisite standard. *State v. Anderson*, 10th Dist. Franklin No. 12AP-133, 2012-Ohio-4733, ¶ 14; *see also State v. Golden*, 10th Dist. Franklin No. 09AP-1004, 2010-Ohio-4438, ¶ 15.

{¶ 46} Collins makes no other arguments to this court regarding why he was unavoidably prevented from discovering his other evidence more timely. Although Collins does do so, we find that the same reasoning that applied to Raynell applies to Dashun Rodgers's affidavit. If Rodgers was with Collins and the group of people

on the night of September 6, 2006, Collins could have obtained Rodgers's testimony at the time of trial by subpoenaing him.

{¶ 47} With respect to Trayvon Little's affidavit, it is substantially similar to his 2009 affidavit that Collins attached to his first motion for leave to file a motion for new trial. In both, Little claims that he is the one who approached White's porch with two guns and robbed the Hendersons and that he later returned for a second time to force the Hendersons to get out of the neighborhood (in his first affidavit) and to make the Hendersons strip (in his second affidavit). But in both affidavits, Little claims he alone committed the aggravated robbery against the Hendersons.

{¶ 48} Collins's evidence relating to Little's affidavit is certainly not new. Moreover, Collins did not appeal the trial court's denial of his first motion for leave to file a motion for new trial. Therefore, Collins is barred by res judicata from using Little's statements a second time. It is well settled that the doctrine of res judicata bars all claims that were raised or could have been in a direct appeal or in prior motions filed under Crim.R. 33. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶ 6; *State v. Williamson*, 8th Dist. Cuyahoga Nos. 107117, 107162, and 107916, 2019-Ohio-1985, ¶ 14.

{¶ 49} We note, however, that even if the trial court could have considered Little's affidavit, it is highly questionable. Little claims that he alone committed the robbery against the victims, first when he approached them on White's porch and robbed them and then "ten to fifteen minutes later," when he went back and made

them strip. The victims and other witnesses, however, all testified that there were two perpetrators.

{¶ 50} Finally, with respect to Tenisha Murphy, she recanted her trial testimony in her affidavit. At trial, Murphy testified that she had known Collins for about two years and that she used to date him. She said that on the day of the aggravated robbery, she had seen Collins wearing black earlier in the day. She said that Collins came over to White's porch three or four times that day to ask where the Hendersons were from. Murphy testified that Collins came back to White's porch wearing a scarf that partially covered his face and produced two guns from his pocket, said, "You all ain't from around here," and robbed the Hendersons. She testified that during the robbery, she recognized Collins from his voice. She further testified that she ran from White's porch at that point. Later, Murphy said that she saw Collins slapping the Hendersons and taking their money. Murphy heard Kenneth Evans say to Collins, "Shawn, stop." According to Murphy's trial testimony, Collins responded, "Don't say my name," and then pointed the gun at Evans. *See Collins*, 8th Dist. Cuyahoga No. 89529, 2008-Ohio-578, ¶ 12-13.

{¶ 51} In her affidavit, however, Murphy states that when she saw Collins earlier in the day on September 1, 2006, he was not wearing black but "a white shirt" and "blue shorts." Murphy averred that while sitting on White's porch that evening, "two boys" approached and although one had a "scarf over his face," she knew it was Little "by his braids and his unmistakable shake." She said the "other boy could have been Kenny Evans," but she was not positive. Murphy further averred that it was

Little who pulled a gun on the Hendersons and said, "You all ain't from around here." Murphy stated it was Little who made the Hendersons take their clothes off and robbed them.

{¶ 52} "Whether evidence was unavailable to an accused at trial is, to some extent, to be determined by whether the source of the evidence was available for examination or cross-examination by an accused['s] counsel at trial." *State v. Wright*, 67 Ohio App.3d 827, 832, 588 N.E.2d 930 (2d Dist.1990), citing *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917), and *State v. Eubank*, 38 Ohio App.3d 141, 528 N.E.2d 1294 (6th Dist.1987). But "when a witness later admits that he lied at trial, that consideration is greatly diminished." *Id*.

{¶ 53} However, witnesses' recantations of their trial testimony are "'looked upon with the utmost suspicion.'" *State v. Nunez*, 8th Dist. Cuyahoga No. 104917, 2017-Ohio-5581, ¶ 35, quoting *State v. Nash*, 8th Dist. Cuyahoga No. 87635, 2006-Ohio-5925. This is because "'the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both times.'" *Id*., quoting *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11. "Consequently, 'there must be some compelling reason to accept a recantation over testimony given at trial.'" *Id*., quoting *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387.

{¶ 54} In this case, the trial court judge reviewing Collins's motion for a new trial also presided over his trial. "'[T]he acumen gained by the trial judge who presided during the entire course of [the] proceedings makes [her] well qualified to rule on the motion for a new trial on the basis of the affidavit[s] and makes a time

consuming hearing unnecessary.'" *State v. Monk*, 5th Dist. Knox No. 03CA12, 2003-Ohio-6799, ¶ 20, quoting *United States v. Curry*, 497 F.2d 99, 101 (5th Cir.1974). As the Ohio Supreme Court explained in *Taylor v. Ross*, 150 Ohio St. 448, 83 N.E.2d 222 (1948):

> "The trial judge is in a peculiarly advantageous position * * * to pass upon the showing made for a new trial. [The judge] has the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives that prompted the recantation. [The judge] is, therefore, best qualified to determine what credence or consideration should be given to the retraction, and [the judge's] opinion is accordingly entitled to great weight. If the rule were otherwise, the right of new trial would depend on the vagaries and vacillations of witnesses rather than upon a soundly exercised discretion of the trial court."

Id. at 452, quoting *State v. Wynn*, 178 Wash. 287, 34 P.2d 900 (1934).

{¶ 55} In reviewing Collins's motion for leave, the trial court did not find Murphy's recantation to be credible. The trial court noted that Murphy's testimony at Collins's bindover hearing and trial was more credible. The trial court indicated that Murphy's trial testimony was similar to that of other witnesses. Indeed, Murphy's trial testimony and White's trial testimony were nearly identical. The trial court further found that the witnesses' testimony at trial indicated that Murphy left as the gunman approached the porch and thus, was not present at the time of the actual robbery. This is not entirely clear, however, because at least one witness (Gerald Henderson) testified that Murphy ran away immediately following the robbery.

{¶ 56} Nonetheless, we still cannot say that the trial court abused its discretion when it found that Murphy's affidavit was not credible. The trial court also did not believe Murphy's 2019 averment that police threatened her to get her to testify against Collins. The trial court found "more validity" to the fact that Collins's family and friends were threatening Murphy at the time of trial, noting that Murphy's mother testified at trial that she ended up moving from the area where the robbery occurred due to the threats from Collins's family.

{¶ 57} We further note that Murphy's affidavit is questionable for another reason. She states in her affidavit that she recognized the first assailant as Little "by his braids and unmistakable shake." But both victims testified that the second assailant had braids, not the first.

{¶ 58} After review, we cannot say that the trial court abused its discretion when it denied Collins's motion for leave to file a motion for new trial because with respect to Dashun Rodgers, Raynell Collins, and Trayvon Little, Collins did not establish by clear and convincing evidence that he was unavoidably prevented from discovering the "new" evidence at the time of trial. And with respect to Tenisha Murphy, the trial court judge, who presided over Collins's trial, did not find Murphy's recantation to be credible. Based on the record before us, we cannot say that the trial court abused its discretion in making these conclusion.

{¶ 59} Collins's second assignment of error is overruled.

V. *Calhoun* Factors

{¶ 60} In his third assignment of error, Collins argues that the trial court abused its discretion when it denied his motion for new trial based on newly discovered evidence without first examining the factors set forth under *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999). Collins contends that if it had, it would have determined that he was entitled to an evidentiary hearing on his motion under *Calhoun*.

{¶ 61} In *Calhoun*, the Ohio Supreme Court held that when determining the credibility of supporting affidavits for purposes of postconviction proceedings, the court should consider the following factors:

> (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.

Id. at 285, citing *State v. Moore*, 99 Ohio App.3d 748, 754-756, 651 N.E.2d 1319 (5th Dist. 1994).

{¶ 62} *Calhoun* applied to postconviction proceedings under R.C. 2953.21, not motions for new trial. But even assuming for the sake of argument that the factors apply to motions for new trial, there was an untimely motion for new trial in this case. Thus, the issue here is whether Collins was unavoidably prevented from

discovering the evidence at the time of trial or within the time limits set forth in Crim.R. 33. With respect to three of the affidavits that Collins attached to his motion for leave, he did not establish by clear and convincing evidence that he was unavoidably prevented from discovering the evidence sooner. Thus, even if *Calhoun* applies, it would only apply to Murphy's affidavit. And applying the *Calhoun* factors to Murphy's testimony does not change the outcome. Again, the trial court presided over Collins's trial. Under *Calhoun*, a trial court may find an affiant's testimony to be incredible because it conflicted with her prior trial testimony when the trial court presided over the trial.

{¶ 63} Accordingly, we find no merit to Collins's third assignment of error and overrule it.

{¶ 64} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
EILEEN A. GALLAGHER, J., CONCUR