[Cite as *State v. Walker*, 2023-Ohio-2689.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112142
v.	:	
JOHNNY WALKER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: August 3, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-04-456529-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Daniel T. Van and Owen Knapp, Assistant Prosecuting Attorneys, *for appellee*.

Russell S. Bensing, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} In this appeal, defendant-appellant, Johnny Walker ("Walker"), appeals from the trial court's judgment denying his motion for leave to file a motion

for new trial. For the reasons set forth below, we reverse and remand for a hearing on Walker's motion.

I. Facts and Procedural History

{¶ 2} In 2005, a jury convicted Walker of aggravated murder and attempted aggravated murder (both counts included firearm specifications). He was also convicted of having weapons while under disability, which was tried before the bench. This court previously summarized the facts of the case in Walker's direct appeal:

> On September 16, 2004, defendant and co-defendant Akanbi Nia [("Nia")] were indicted pursuant to a ten-count indictment in connection with the August 26, 2004, shooting of Jessica Weakley [("Weakley")], and the attempted killing of Marique Farr [("Farr")].
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> * * *
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> The evidence established that Marique Farr was a drug dealer [and] Jessica Weakley was his girlfriend. Defendant Nia was holding $26,000 that belonged to Farr, but returned this money to him approximately one week prior to the shooting.
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> On August 26, 2004, * * * Farr * * * planned to drive to Fort Wayne, Indiana later that night to purchase drugs. Weakley * * * accompan[ied] Farr as he drove to Indiana.
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> * * *
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> Farr had a backpack containing $26,000 in the backseat of the car with which he planned to buy a kilo of cocaine. Farr called Nia and arranged to pick up $ 100 which Nia owed him. Nia asked Farr to pick up defendant, whom he referred to as "Cash." Farr and Weakley picked defendant up [and] then drove to Nia's house[.] They waited in the driveway for Nia and Nia asked defendant to come up to his apartment. After a few minutes, defendant and Nia got back into the car and Nia gave Farr the money he owed him.

Nia then asked Farr to drive him to his aunt's house * * * so that he could pick up his car, a red Chevrolet. Farr drove with Weakley in the front passenger seat, defendant in the rear passenger's side seat, and Nia in the rear driver's side seat. Nia's car was not in the parking lot and Nia made a few phone calls then told Farr to wait. Farr next observed defendant scooting toward Nia. Defendant had a black gun in his hand. Defendant then shot Farr. Weakley screamed, more shots were fired and Weakley slumped forward.

Weakley was shot behind her left ear with a 9 millimeter weapon * * * which caused death within a few minutes. * * * Farr was shot in the head and suffered severe and life threatening injuries to the right side of his brain. He is now blind and paralyzed on his left side.

* * *

Three nine-millimeter shell casings were found in the passenger compartment. Neither a backpack nor money was recovered from the car. A homemade silencer for a weapon was recovered from the front passenger's seat. * * *

Christopher Page [("Page")] * * * was standing with family members in the parking lot at the back of the building and heard the sound of a car crashing, then heard three or four shots. He observed a male in beige pants and a coat covering his face grab items out of a gray car. He did not know the man's race, but his arm was "light skinned." The man left and Page noticed that two people were in the car. A female occupant appeared dead but the male occupant began coughing up blood. Page's uncle called the police. Police and EMS arrived on the scene at approximately 4:55 p.m. Page subsequently described the man to police as a black male, with a medium complexion, wearing a back basketball jersey with no shirt underneath, and beige pants.

[Farr] was in a coma for several days following the shooting. * * * The police * * * presented Farr with the names of various suspects. When asked about Nia, a name provided to East Cleveland Det. Marche by an anonymous tipster, Farr positively responded. Nia was subsequently questioned and told police that he saw Farr and Weakley on the date of the shootings but did not speak to them. Phone records demonstrated, however, that Nia had called Farr six times on the date of the shooting. In a second statement, Nia told Det. Marche that he owed Farr $300 and Farr wanted his money before he left for Indiana later that day. According to Nia's written statement, Farr related that someone named Cee Cee had tried to rob him. The next day, Cee Cee told Nia that he

had heard Farr wanted to kill him and he was going to kill Farr before Farr killed him.

* * *

Nia was jailed in connection with the homicide investigation. He passed a note to a "jail trustee" which indicated in part "Tell Jay * * * to look under my passenger seat and grab that from the Malibu. Tell Cash they trying to play us, somebody telling them false information about us."

Det. Marche noted that a red Malibu had been parked near the crime scene. A for sale sign on the car listed Nia's cell phone number. The department's drug dog alerted at the car and the officers subsequently recovered 70 grams of cocaine from the unlocked car. While they were towing the car, Jemall Simms, aka "Jay" approached and spoke with the officers. The officers subsequently learned that "Cash" is defendant Johnny Walker.

Defendant drove past a few minutes later and was arrested. Per department policy, his car was to be towed, and its contents were inventoried. Police found a home made "suppressor" for weapon.

Defendant made a statement to police in which he indicated that he had seen Farr and a female on the day of the shooting, and that Nia had repaid Farr the money he owed Farr. He denied shooting Farr and additionally stated that Nia was with him. He acknowledged that the item found behind Weakley's body was a silencer and when asked who else would have a silencer defendant indicated, "just me and Mark [Farr]."

* * *

The jury found defendant guilty of one count of aggravated murder and one count of attempted aggravated murder, and the trial court found defendant guilty of having a weapon while under disability. Defendant was sentenced to twenty years to life imprisonment on the aggravated murder charge, plus a six-year term for the firearm specification, a consecutive eight-year term on the attempted murder charge, and a concurrent three-year term of imprisonment for having a weapon while under disability.

State v. Walker, 8th Dist. Cuyahoga No. 87373, 2007-Ohio-393, ¶ 2-10, 13-16, 21 ("*Walker I*").

{¶ 3} In *Walker I*, Walker challenged his convictions as well as his sentence. We affirmed his convictions but vacated his sentence and remanded for resentencing in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Id.* at ¶ 72.

{¶ 4} Following our remand, Walker was resentenced to 32 years to life. The trial court, however, did not advise him at resentencing that he would be subject to postrelease control. As a result, Walker appealed again in *State v. Walker*, 8th Dist. Cuyahoga No. 89950, 2008-Ohio-2180 ("*Walker II*"). In *Walker II*, Walker argued, and the state conceded, that his sentence was void under *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. *Id.* at ¶ 5. Walker's sentence was vacated in part and remanded for resentencing on his attempted murder count and having weapons count. *Id.* at ¶ 6, 21. Following the second remand, the trial court sentenced Walker, in September 2008, to 32 years to life and advised Walker that he would be subject to five years of mandatory postrelease control.

{¶ 5} Then on August 9, 2022, Walker filed a pro se motion for leave to file a motion for a new trial. In his motion, Walker argued that he was unavoidably prevented from discovering evidence. Specifically, Walker discovered a witness who observed the aftermath of the shooting. Walker claims that in August 2021, he hired a private investigator to investigate rumors from individuals familiar to the case of a possible new witness coming forward. Walker was unsatisfied with this

investigator and hired a new investigator in June 2022, who secured a copy of an affidavit from Jack Chandler ("Chandler").

{¶ 6} In his affidavit, Chandler avers that he was 14 years old at the time of the incident and did not come forward and reveal what he observed on August 26, 2004, because he was terrified. He never reached out to police or his family because he was scared even after he had heard Nia and Walker were charged and convicted of murder. He eventually decided to share what he witnessed and reached out to Nia's family. As to what he observed, Chandler avers that he was outside playing basketball when a man appeared in the alley across the street. The man was covered in blood and had on black jogging pants and a grey and beige hooded jacket. He ran out of the alley and to a Ford Excursion parked on the street. He left in a Ford Excursion. Chandler avers that he was able to see the man's face clearly, and this man was not Walker or Nia, whom he knew from the neighborhood.

{¶ 7} Walker claims that he was unavoidably prevented from discovering this witness, prior to, or after trial, because he did not know the witness even existed. The state opposed the motion, arguing that Walker relies on the same affidavit used by Nia in his motion for a new trial, which Nia filed in March 2021 and was denied by the trial court. The state further argued that defense counsel could have located Chandler as a witness because he lived in the neighborhood where the shooting occurred.

{¶ 8} The trial court denied Walker's motion, noting that Nia sought a new trial in March 2021, which the court denied. The court stated:

> "While Chandler's affidavit states that Chandler was put in touch with Nia's attorney in December 2020, absent from the motion and affidavit, however, is any time frame from the point the Defendant or Defendant's family was made aware of Chandler to the time Defendant's motion was filed. The Court, therefore, does not have 'the facts necessary [to determine] whether the motion for leave was filed within a reasonable time after acquiring the newly-discovered evidence.' *State v. Gray*, [8th Dist. Cuyahoga No. 92646, 2010-Ohio-11], ¶ 22.
>
> Regardless, Defendant's motion, on its face, does not present clear and convincing proof to demonstrate that he was 'unavoidably prevented' from finding witnesses who lived in the neighborhood where the crime occurred, 'and could not have learned of the matters concerned within the time provided by Crim.R. 33(B), in the exercise of reasonable diligence.' *State v. Sawyer*, 8th Dist. Cuyahoga No. 85911, 2005-Ohio-6486, ¶ 11."

[*Nia* Opinion, p. 3.]

> On top of this basis for denial, which also applies as to Defendant Walker, Defendant Walker filed his motion five months after this Court ruled on Nia's motion, and nearly one year after Nia filed his motion with Chandler's Affidavit, which was publicly available.
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> * * *
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> Defendant Walker does not cite any basis of why he was, even with reasonable diligence, unavoidably prevented from discovering Chandler, prior to trial other than "he did not know the witness even existed" until he decided to come forward 17 years after the conviction. Instead, he concentrates on the reasons why he was unavoidably prevented from discovering the publicly available information until a year after it was filed.

(Oct. 20, 2022 JE, pgs. 3-5.)

{¶ 9} It is from this order that Walker appeals, raising the following single assignment of error for review:

> **Assignment of Error:** The trial court erred in denying [Walker's] motion for leave to file a delayed motion for new trial.

II. Law and Analysis

{¶ 10} Walker argues the trial court abused its discretion in determining that he did not use reasonable diligence in discovering Chandler's evidence.

1. Standard of Review

{¶ 11} On appeal, we review of the denial of a motion for leave to file a delayed motion for new trial for an abuse of discretion. *State v. Hill*, 8th Dist. Cuyahoga No. 108250, 2020-Ohio-102, ¶ 13, citing *State v. Dues*, 8th Dist. Cuyahoga No. 105388, 2017-Ohio-6983, *discretionary appeal not allowed*, 152 Ohio St.3d 1411, 2018-Ohio-723, 92 N.E.3d 881. 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*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35.

2. Crim.R. 33 — New Trial

{¶ 12} Crim.R. 33 provides that a new trial may be granted on motion of the defendant where new evidence materially affects the defendant's substantial rights and satisfies the following:

> When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

Crim.R. 33(A)(6).

{¶ 13} Under Crim.R. 33(B), a motion for new trial based on newly discovered evidence must be filed within 120 days after a verdict is rendered. A defendant who fails to file a motion for new trial within the prescribed timeframe must seek leave from the trial court to file a delayed motion for new trial. *State v. Hale*, 8th Dist. Cuyahoga No. 107782, 2019-Ohio-1890, ¶ 9, citing *State v. Bryan*, 8th Dist. Cuyahoga No. 105774, 2018-Ohio-1190, citing *Dues*; *State v. Mathis*, 134 Ohio App.3d 77, 730 N.E.2d 410 (1st Dist.1999). To obtain leave, Crim.R. 33(B) requires that the defendant must demonstrate clear and convincing proof that the defendant was unavoidably prevented from filing the motion for a new trial. *See also State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513 (where the Ohio Supreme Court stated, "[t]he 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." *Id.* at ¶ 30.)

{¶ 14} 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.'" *State v. Gray*, 8th Dist. Cuyahoga No. 107394, 2019-Ohio-1638, ¶ 12, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 15} In *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, the Ohio Supreme Court recently examined the scope of the "unavoidably prevented" requirement in Crim.R. 33(B) to determine whether the rule imposes a reasonable time requirement The *Bethel* Court noted that historically appellate courts have concluded that a defendant must file a motion for leave within a reasonable period of time after discovering the new evidence. *Id.* at ¶ 53. The court, however, applied "general principles of statutory construction" and determined that the rules do not authorize or support the "creation of a reasonable-time filing requirement" under Crim.R. 33(B). *Id.* at ¶ 54-55.

{¶ 16} *Bethel* clarified that Crim.R. 33(B) "does not establish a time frame in which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence." *Id.* at ¶ 55. The court further explained that "[t]he 'unavoidably prevented' requirement in Crim.R. 33(B) mirrors the 'unavoidably prevented' requirement in R.C. 2953.23(A)(1)." *Id.* at ¶ 59, citing *State v. Barnes*, 5th Dist. Muskingum No. CT2017-0092, 2018-Ohio-1585.

{¶ 17} In the instant case, Walker was convicted in 2005 and he filed his motion for leave in 2022, which is well beyond Crim.R. 33(B)'s 120-day time limit. Therefore, Walker's motion must establish, by clear and convincing evidence, that he was "'unavoidably prevented from the discovery of the evidence upon which he must rely.'" *Bethel* at ¶ 53, quoting Crim.R. 33(B).

3. Chandler Affidavit

{¶ 18} Walker argues he was unavoidably prevented from receiving the evidence contained in Chandler's affidavit because Chandler stated that he never disclosed what he observed after the shooting. As a result, he could not discover a witness that no one knew existed.

{¶ 19} In the affidavit, Chandler specifically avers that he was 14 years old at the time of the incident and did not come forward and reveal what he observed on August 26, 2004, because he was terrified. He never reached out to police or his family because he was scared. He eventually decided to share what he witnessed and reached out to Nia's family. In the aftermath of the shooting, Chandler observed a man who was covered in blood and wearing black jogging pants and a grey and beige hooded jacket. This man ran out of the alley and to a Ford Excursion parked on the street. Chandler observed the man's face clearly and avers that this man was not Walker or Nia, whom he knew from the neighborhood.

{¶ 20} "A criminal defendant is only entitled to a hearing on a motion for leave to file a motion for a new trial if he or she submits documents which, on their face, support his or her claim that he or she was unavoidably prevented from timely discovering the evidence at issue." *State v. McFarland*, 8th Dist. Cuyahoga No. 111390, 2022-Ohio-4638, ¶ 28, citing *Dues*, 8th Dist. Cuyahoga No. 105388, 2017-Ohio-6983, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77 (2d Dist.); *see also State v. Martin*, 8th Dist. Cuyahoga No. 110549, 2022-Ohio-1494, ¶ 36, citing *State v. Metcalf*, 2d Dist. Montgomery No. 26101, 2015-Ohio-3507, *McConnell*.

{¶ 21} In the instant case, Walker submitted evidence that, on its face, demonstrates he was unavoidably prevented from discovering and presenting Chandler's eyewitness account sooner — he could not have discovered evidence that no one, besides Chandler, knew existed. Because Walker established by clear and convincing proof that he was unavoidably prevented from discovering this evidence, he is entitled to a hearing on his motion for leave.

{¶ 22} Thus, based on the facts and circumstances of this case, we find that the trial court abused its discretion when it denied Walker's motion for leave, and the sole assignment of error is sustained.

III. Conclusion

{¶ 23} Walker is entitled to a hearing on his motion for leave to file a motion for a new trial because the affidavit he submitted, on its face, supports his claim that he was unavoidably prevented from discovering the evidence at issue.

{¶ 24} Accordingly, judgment is reversed, and the matter is remanded for a hearing on the motion for leave to file a motion for new trial.

It is ordered that appellant recover from appellee 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.

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MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
MICHAEL JOHN RYAN, J., CONCUR