

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 30573

Appellee

v.

CARL C. BROOKS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 05 09 3336

DECISION AND JOURNAL ENTRY

Dated: August 9, 2023

STEVENSON, Judge.

{¶1} Defendant-Appellant Carl C. Brooks appeals from the judgment of the Summit County Court of Common Pleas denying his motion for leave to file a motion for a new trial. This Court affirms.

I.

{¶2} This is not Mr. Brooks’ first appeal. Mr. Brooks appealed his murder conviction in *State v. Brooks*, 9th Dist. Summit No. 23237, 2007-Ohio-1424 (“*Brooks I*”). This Court summarized the pertinent facts in *Brooks I* as:

On August 29, 2005, [Mr. Brooks], a juvenile, was arrested for one count of murder, in violation of R.C. 2903.02(B). The predicate offense was felonious assault (R.C. 2903.11(A)(1)). The matter was transferred from the juvenile court to the general division and [Mr. Brooks] was thereafter indicted and brought to trial on April 18, 2006. [Mr. Brooks] was convicted by a jury on April 20, 2006, and sentenced on April 24, 2006, to an indeterminate period of not less than fifteen years and not more than the maximum of life imprisonment.

[Mr. Brooks] was convicted of the murder of Alvin Tarver. Another man (Toi Caldwell) was also convicted for Mr. Tarver’s murder. Both men were

accused of being part of an attack on Mr. Tarver on August 1, 2003, during which Mr. Tarver was beaten by a group of men, which attack also included [Mr. Brooks] and Mr. Caldwell jumping from a retaining wall on to Mr. Tarver's head. There was also testimony at trial that [Mr. Brooks] held a gun to Mr. Tarver's head but did not pull the trigger. After being attacked, Mr. Tarver was taken to the hospital and remained in a semi-conscious state under the care of the hospital and a nursing home until his death on March 15, 2005. The Summit County Medical Examiner ruled the cause of Mr. Tarver's death was homicide because Mr. Tarver was '[b]eaten/struck by other(s).' The attack that led to Mr. Tarver's death was witnessed by several people, although some witness testimony was not procured until Mr. Tarver died and the police began a murder investigation, 19 months after the initial attack.

Id. at ¶ 2-3. This Court affirmed Mr. Brooks' conviction in *Brooks I*. *Id.* at ¶ 1.

{¶3} After this Court issued its decision in *Brooks I*, the trial court denied Mr. Brooks' petition to vacate or set aside judgment pursuant to R.C. 2953.21. With new counsel, Mr. Brooks later filed a motion for further proceedings on his post-conviction petition. The trial court denied this motion and Mr. Brooks attempted to appeal in *State v. Brooks*, 9th Dist. Summit No. 26264 ("*Brooks II*"). This Court dismissed *Brooks II* on February 8, 2012.

{¶4} Over five years later, Mr. Brooks filed a pro se motion to vacate judgment with the trial court on April 10, 2017. The trial court denied this motion on July 21, 2017.

{¶5} On November 22, 2021, Mr. Brooks moved for leave to file a motion for a new trial with the trial court. Mr. Brooks claimed that the verdict form and jury instructions the original judge gave to the jury, as recorded in the transcripts filed in *Brooks I*, were newly discovered evidence and sufficient to grant him a new trial. The trial court denied Mr. Brooks' motion for leave to file a motion for a new trial on January 3, 2023. Mr. Brooks appeals the trial court's order, asserting three assignments of error for review.

II.

ASSIGNMENT OF ERROR NO: ONE

THE TRIAL COURT WAS IN ERROR FOR FAILURE TO GRANT DEFENDANT-APPELLANT, CARL BROOKS [A] NEW TRIAL BECAUSE THE TRIAL JUDGE SUSAN BAKER-ROSS FAILED TO GIVE THE JURY THE INSTRUCTION TO [INCLUDE] THE LESSER DEGREE'S ELEMENTS OF THE MURDER STATUTES, PURSUANT TO OHIO REVISED CODE 2945.75(A)(2)[.]

{¶6} Mr. Brooks argues in his first assignment of error that, due to the error of the trial judge¹, prosecutorial misconduct, and ineffective assistance of counsel, the jury did not receive proper jury instructions or verdict forms including five crimes he believes are lesser-included offenses to murder and, as such, the trial court erred when it failed to grant his motion for leave to file a motion for a new trial. We disagree.

{¶7} A trial court's decision to grant or deny a motion for a new trial will not be reversed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990); *State v. Brown*, 9th Dist. Summit No. 27526, 2015-Ohio-2131, ¶ 9. An abuse of discretion implies that the trial court's decision is arbitrary, capricious, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983).

{¶8} Pursuant to Crim.R. 33(A)(6), a new trial may be granted on the motion of the defendant "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." A motion for a new trial must be filed within 14 days after the verdict is rendered unless it is based upon newly discovered evidence. Crim.R. 33(B). A defendant must file a motion for a new trial based upon newly

¹ Mr. Brooks argues in his brief that Judge Susan Baker Ross failed to give the proper jury instructions and submit the proper verdict forms to the jury. This Court notes that the trial judge at the time of Mr. Brooks' trial was Judge Jane Bond.

discovered evidence within 120 days. *Id.* An exception for newly discovered evidence applies, however:

[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, such motion shall be filed within seven days from an order of the [trial] court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(Emphasis added.) *Id.*

{¶9} “Clear and convincing proof 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. Mathis*, 134 Ohio App.3d 77, 79 (1st Dist.1999), *overruled on other grounds*, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031 (1st Dist.). Clear and convincing proof is that “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 (1954), paragraph three of the syllabus.

{¶10} “Crim.R. 33(B) calls for an initial determination that there was an unavoidable delay.” *State v. Holmes*, 9th Dist. Lorain No. 05CA008711, 2006-Ohio-1310, ¶ 11. “Although a defendant may file his motion for a new trial along with his request for leave to file such motion, the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay.” (Internal quotations and citations omitted.) *State v. Covender*, 9th Dist. Lorain No. 11CA010093, 2012-Ohio-6105, ¶ 13. ““Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence.”” *Id.* at ¶ 14, quoting *State v. Rodriguez-Brown*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11.

{¶11} Mr. Brooks’ motion for leave to file a motion for a new trial, filed over 15½ years after his conviction, did not meet the 120–day deadline for the submission of newly discovered evidence. Crim.R. 33(B). Therefore, he was required to show by clear and convincing evidence that he was unavoidably prevented from discovering the evidence within 120 days after the verdict. *Mathis*, 134 Ohio App.3d at 79; *Holmes*, 9th Dist. Lorain No. 05CA008711, 2006-Ohio-1310, at ¶ 11. We conclude that Mr. Brooks failed to make such a showing.

{¶12} Mr. Brooks’ motion for leave to file a motion for a new trial was based on the jury instructions and verdict form, both filed on August 25, 2006. The jury instructions and verdict form were filed and on the court record when Mr. Brooks brought his direct appeal in *Brooks I*. Information available in the trial court’s initial appellate record does not constitute newly discovered evidence. See *State v. Morris*, 2d Dist. Montgomery Nos. 26949, 26960, 2017-Ohio-1196, ¶ 32; *State v. Stone*, 9th Dist. Lorain No. 89CA004522, 1989 WL 117280, *2 (Oct. 4, 1989).

{¶13} Accordingly, we conclude that the trial court did not abuse its discretion in denying Mr. Brooks’ motion for leave to file a motion for a new trial. Mr. Brooks’ first assignment of error is overruled.

ASSIGNMENT OF ERROR NO: TWO

THE TRIAL COURT WAS IN ERROR FOR FAILURE TO ADDRESS DEFENDANT-APPELLANT’S, CARL BROOKS “STRUCTURAL DEFECT CLAIM[.]”

ASSIGNMENT OF ERROR NO: THREE

THE TRIAL COURT WAS IN ERROR FOR FAILURE TO HEAR DEFENDANT[-]APPELLANT’S, CARL BROOKS UNTIMELY PETITION, PURSUANT TO OHIO REVISED CODE 2953.23(A)(1)(a)(b)[.]

{¶14} This Court will address Mr. Brooks’ second and third assignments of error together. Mr. Brooks argues in his second assignment of error that the trial court erred when it failed to

address his structural defect claim. Mr. Brooks asserts in his third assignment of error that the trial court erred when it failed to hear his R.C. 2953.21 petition.

{¶15} The only matter before the trial court was Mr. Brooks' motion for leave to file a motion for new trial. The arguments raised in the second and third assignments of error are beyond the scope of the order appealed and, therefore, are not properly before this Court and are overruled on that basis.

{¶16} Accordingly, Mr. Brooks' second and third assignments of error are overruled.

III.

{¶17} For the reasons stated above, Mr. Brooks' first, second, and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SCOT STEVENSON
FOR THE COURT

SUTTON, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

CARL C. BROOKS, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and JACQUENETTE S. CORGAN, Assistant Prosecuting Attorney, for Appellee.