

IN THE
SUPREME COURT OF OHIO

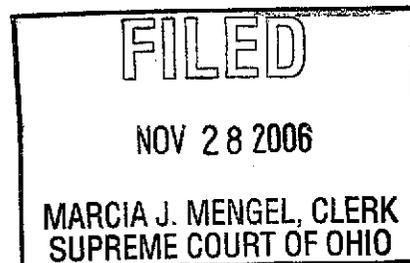
STATE OF OHIO : NO. 2006-2076
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
JONATHAN HIRSCH : Court of Appeals
Defendant-Appellant : Case Number C050529

MEMORANDUM IN RESPONSE

Joseph T. Deters (0012084P)
Prosecuting Attorney

Scott M. Heenan (0075734P)
Assistant Prosecuting Attorney
Counsel of Record

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3227
Fax No. (513) 946-3021



COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

Bryan R. Perkins
Attorney at Law
810 Sycamore Street, 5th Floor
(513) 579-8700

COUNSEL FOR DEFENDANT-APPELLANT, JONATHAN HIRSCH

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION 1.

STATEMENT OF THE CASE AND FACTS 2.

ARGUMENTS AGAINST APPELLANT’S PROPOSITIONS OF LAW AND IN SUPPORT OF APPELLEE’S PROPOSITION OF LAW 3.

Appellee’s Proposition of Law: A defendant seeking leave to file a motion for a new trial beyond 120 days from the date of his conviction must present clear and convincing evidence that he or she was unavoidably prevented from discovering the new evidence within those 120 days. 3.

Authorities Presented:

- Crim.R. 33(B) 3, 5.
- Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118 3.
- State v. Dodrill* (Oct. 28, 1987), 9th Dist. No. 4204, 1987 Ohio App. LEXIS 9441 4.
- State v. Kiraly* (1977), 56 Ohio App.2d 37, 55, 381 N.E.2d 649 4.
- State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605 3.
- State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54 3-4.
- State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859. 3.

CONCLUSION 8.

CERTIFICATE OF SERVICE 8.

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2006-2076
Plaintiff-Appellee :
vs. :
JONATHAN HIRSCH : MEMORANDUM IN RESPONSE
Defendant-Appellant :

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Defendant-Appellant Jonathan Hirsch wants this Court to review the underlying decision not for an error in the law, but for an error in the application of that law. The law that was properly used by both the trial court and the court of appeals is well settled in Ohio. Hirsch has not challenged the validity of the law as it stands. Instead, he wants this Court to double check the First District Court of Appeals. That is not this Court's function. Even if it was, the underlying courts properly applied the law. Therefore, this Court should decline jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

On March 25, 1997, Defendant-Appellant Jonathan Hirsch was found guilty of committing murder and was sentenced to life in prison. This First District Court of Appeals affirmed his conviction on August 8, 1998.

Some five years after his conviction, in June 2002, he obtained three affidavits from individuals claiming that Hirsch was somewhere else on the day of the murder. In 2003, some six years after his conviction, Hirsch hired a private investigator to investigate his case. Hirsch's investigator "discovered" things he feels are problematic. All of this "discovered" evidence, however, was available within 120 days of Hirsch's trial. In 2005, Hirsch finally filed his motion for leave. In his motion, Hirsch completely failed to explain by clear and convincing evidence why he how he was unavoidably delayed from filing a timely motion for a new trial. Citing this extreme tardiness and the lack of explanation for the tardiness, the trial court denied Hirsch's motion.

**ARGUMENTS AGAINST APPELLANT'S PROPOSITIONS OF LAW AND IN
SUPPORT OF APPELLEE'S PROPOSITION OF LAW**

Appellee's Proposition of Law: A defendant seeking leave to file a motion for a new trial beyond 120 days from the date of his conviction must present clear and convincing evidence that he or she was unavoidably prevented from discovering the new evidence within those 120 days.

Hirsch argues that the trial court erred by denying his motion for leave to file a motion for a new trial. Because Hirsch failed to show by clear and convincing evidence that he was unavoidably prevented from discovering the evidence within 120 days the trial court properly denied his motion.

Crim.R. 33(B) provides that if a defendant fails to file a motion for a new trial within 120 days of the jury's verdict, he or she must seek leave from the trial court to file a delayed motion. To obtain leave, the defendant must show by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days.¹ "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence."² Clear and convincing proof is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt: it "produces in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."³ Thus, in order for a trial court to properly reach the merits of an

¹*State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶¶ 26-27.

²*State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859.

³*State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

untimely motion for a new trial, 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.⁴

"Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof."⁵ Where there is competent and credible evidence supporting the trial court's decision, the appellate court should not substitute its judgment for that of the trial court.⁶

The main reason the trial court denied the motion to file a delayed motion for a new trial was how extraordinarily late the motion was filed. Hirsch has failed to explain his lengthy delay.

Hirsch argues that he should have been granted leave because the private investigator he hired in 2003, six years after he was convicted, discovered things that Hirsch believes are problematic. He argues that numerous *Brady* violations occurred, that the police failed to pursue other suspects, that evidence from his trial is now missing, that he was the victim of prosecutorial misconduct, that scientific tests connecting him to his crime are faulty, that new witnesses have come forward, and that he suffered from the ineffective assistance of counsel. All of this, he claims, he was unavoidably prevented from discovering within 120 days of his conviction.

⁴See *State v. Kiraly* (1977), 56 Ohio App.2d 37, 55, 381 N.E.2d 649 and *State v. Dodrill* (Oct. 28, 1987), 9th Dist. No. 4204, 1987 Ohio App. LEXIS 9441.

⁵*Schiebel*, supra, at 74, 564 N.E.2d at 60.

⁶*Id.*

Hirsch was convicted of his crimes in 1997. It took him six years – six years he fails to explain – to finally get around to hiring his private investigator. Nothing prevented Hirsch from hiring a private investigator within the 120 days allotted to him by Crim. R. 33.

Even if this is overlooked, all of the information that Hirsch's investigator "discovered" existed and could have been obtained within 120 days of his trial. Hirsch could have made the same public records requests that lead to his claimed *Brady* violations within 120 days. But he failed to do so. Hirsch could have contacted all of the various witnesses who have now, years after the actual events, submitted affidavits attesting to events that occurred on specific days in 1994 within 120 days. But he again failed to do so. Hirsch knew from his relationship with one of the prosecution's main witnesses, Hans Cone, that Cone was going to be less than friendly towards him. Despite the fact that this was well known at the time of his trial it has taken Hirsch an unexplained six years to "uncover" the evidence that shows this animosity. Hirsch was well aware of his counsel's performance at the time his trial took place. As with everything else in this case, Hirsch once again sat on his hands doing nothing for years before finally getting around to filing a Crim. R. 33 motion with the trial court.

What is even more telling is the fact that some of the affidavits Hirsch is relying upon were prepared and sworn to *before* he hired his private investigator. The affidavits of Mark Lawrence, Chester Pilkinton, and Herberta Lawrence were all sworn to in June, 2002 – over a year before Hirsch got around to hiring his private investigator.

Hirsch also claims that he has somehow just discovered that the prosecutor engaged in misconduct during his criminal trial and that his trial counsel was ineffective. How it took Hirsch eight years to discover this is unexplained, likely because there is no explanation. After all, Hirsch

had to know about the prosecutorial misconduct considering he alleged it during his direct appeal.

And Hirsch was equally aware of his trial counsel's performance. He accuses his now deceased trial counsel of being ineffective based off of things missing from his trial counsel's file. Of course, considering the fact that his trial counsel is no longer alive, no one can tell us if the things that Hirsch believes should have been in the file were left out due to ineffective assistance or have simply gone missing due to the extensive period of time between his trial and his motion for leave. No one has anyway of knowing if trial counsel's file, as it exists today, is the complete file that existed at the time of trial.

Hirsch is equally critical of the fact that certain evidence that existed at the time of trial either no longer exists or at least cannot be found. Once again, nearly a decade past between the time of Hirsch's crime and when he finally got around to starting up his investigation. Had he acted in a timely manner chances are the evidence used at trial would have been easily accessible. But he sat around and waited until the evidence that was used against him has disappeared before filing his motion for leave.

Hirsch has continued to sit and to allow this case to stagnate for years. Despite the fact that he could have discovered the evidence he has presented within 120 days of his trial he failed to do so. As the trial court ruled, the "reasons for the 6 year delay [in hiring an investigator] are not set forth in the motion with any particularity." Hirsch has equally failed to set forth reasons for this lengthy delay with any particularity on appeal.

Hirsch failed to present clear and convincing evidence showing that he was unavoidably delayed in filing a motion for a new trial within 120 days. Having entirely failed to present such

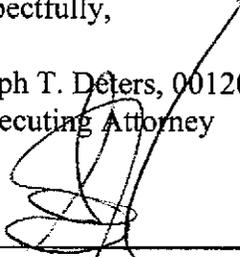
evidence the trial court properly denied the motion for leave to file a motion for a new trial and the First District Court of Appeals properly affirmed that decision.

CONCLUSION

Hirsch wants this Court to do nothing more than to double check the underlying court's application of established law. He raises no issues of public or great general interest nor does he raise any substantial constitutional questions. Therefore, this Court should decline jurisdiction over this matter.

Respectfully,

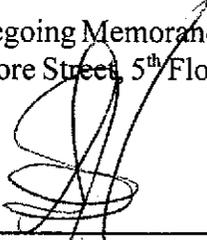
Joseph T. Deters, 0012084P
Prosecuting Attorney



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3227
Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Bryan R. Perkins, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, counsel of record, this 20th day of November, 2006.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney