

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 Appellee, : Case No. 09-2028
 -vs- :
 Roland T. Davis, :
 Appellant. : **Death Penalty Case**

On Appeal from the Court of Appeals of Licking County,
Fifth Appellate District, Case No. 2009-CA-00019

Appellant Roland Davis's Memorandum in Support of Jurisdiction

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Explanation of Why This Case Is a Case of Public or Great General Interest and Involves a Substantial Constitutional Question

Appellant Roland Davis is a death-row inmate who discovered new evidence that affects his capital conviction. Davis was unavoidably prevented from discovering his new evidence within the time limit set in Ohio R. Crim. P. 33(B). He asked the trial court for leave to file a delayed motion for a new trial, as provided for in Crim. R. 33(B). The trial court considered Davis's motion for leave and then denied it. On appeal, the Fifth Appellate District relied on this Court's decision in State ex rel. Special Prosecutors v. Judges of Belmont Cty. Court of Common Pleas, 55 Ohio St. 2d 94 (1978), to hold that the trial court did not have jurisdiction even to consider the motion. If the court of appeals' interpretation of Special Prosecutors is left intact, it will affect all criminal defendants who seek to fulfill their Fourteenth Amendment due-process rights in the trial court through post-trial motions.

This Court should grant jurisdiction to narrow its ruling in Special Prosecutors and define when a trial court's ruling on a post-trial motion would be inconsistent with the judgment of the court of appeals, so that lower courts will not misinterpret this decision. See id. at 97. If applied literally, the effect of this Court's broad holding in Special Prosecutors would be to prohibit all post-trial motions and actions, including cases in which a capital defendant may prove his or her actual innocence. A point that creates confusion, and that has resulted in differing appellate opinions, is whether a trial court may rule on a post-trial issue when that issue has been precisely rejected by the court of appeals or whether the trial court may act *at all* when a higher court has issued its opinion on the judgment. The Fifth District's opinion appears to take the position that a trial court may not act, even in a case such as Davis's where the previous appeal had nothing to do with the issue raised in the later new trial motion.

In Davis's case, the claim that forms the basis of his new trial motion was not presented to this Court on direct appeal. See State v. Davis, 116 Ohio St. 3d 404 (2008). The issue involves defense counsel's failure to present a DNA expert at trial to refute the testimony of the State's expert witness. Davis appended the affidavit of a DNA expert to his new trial motion, which is evidence outside the record. This claim of ineffective assistance of counsel could not have been raised and decided on direct appeal because this Court was limited to the trial-court record and therefore could not have considered the expert's affidavit. See State v. Ishmail, 54 Ohio St. 2d 402, 406 (1978). Under these circumstances, the trial court's action on the new trial motion should not be deemed inconsistent with this Court's judgment. And because the trial court's action was not inconsistent, it had jurisdiction to consider the matter. See Special Prosecutors, 55 Ohio St. 2d at 97.

The court of appeals' use of Special Prosecutors also conflicts with Ohio R. Crim. P. 33(B). The Criminal Rule gives defendants the right to file a motion for a new trial based on newly discovered evidence. But the broad interpretation of Special Prosecutors employed by the Fifth District and other lower courts precludes defendants from using this remedy if they have filed an appeal. It has been held that the trial court loses jurisdiction, not merely after an appellate judgment is rendered, but at "the moment the direct appeal is filed." State v. Parks, No. 08 CA 857, 2009 Ohio App. LEXIS 4095, at **5 (Carroll Ct. App. Sept. 10, 2009). Court decisions that are at odds with the procedural rules create a quandry over which post-trial actions defendants may pursue. If the Fifth Appellate District's opinion stands, along with similar appellate decisions, Crim. R. 33 will be effectively repealed. According to the Fifth District's opinion, what Crim. R. 33(B) gives, Special Prosecutors takes away. This Court should accept jurisdiction to resolve the tension between the caselaw and the procedural rule.

Regardless of the underlying merits of Davis's claim in his new trial motion, the Fifth District's denial on flawed procedural grounds warrants a close examination by this Court. This Court must grant jurisdiction to hear this case and reverse the erroneous decision of the court of appeals. The impact of the appellate court's opinion is not limited to Davis's case; it affects civil and criminal litigants alike. Overly broad use of Special Prosecutors and inconsistencies among the lower courts in handling post-trial motions compels clarification from this Court.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Appellant Roland Davis is a death-row inmate who is before this Court seeking discretionary review of the trial court's denial of his request for leave to file a new trial motion. He alleged in his new trial motion that his defense attorneys were ineffective because they did not adequately contest the State's DNA evidence at trial. Davis moved the trial court under Ohio R. Crim. P. 33(B) to find that he was unavoidably prevented from discovering his new evidence within 120 days of the jury verdict. (Dkt. 10/31/2008.) Davis also proffered his substantive new trial motion with requests for discovery and an evidentiary hearing. The affidavit of Dr. Laurence Mueller, a DNA expert, was attached to the new trial motion. See Ohio R. Crim. P. 33(A)(6).

Dr. Mueller evaluated the DNA evidence the State presented at trial. He concluded that the statistical probabilities of a match between Davis's DNA profile and the genetic material from the crime scene were exaggerated. Dr. Mueller also found that this defect in the State's DNA presentation to the jury was magnified because Davis's brother, Randy Davis, was a possible source of the crime-scene DNA. Trial counsel offered Randy Davis as an alternative suspect to this capital crime. (T.p. 1799.)

The State opposed Davis's motion (Dkt. 11/26/2008) and supplemented its response with a letter from a Mark Losko, a forensic scientist with BCI & I. (Dkt. 01/20/2009.) Losko said that he tested the DNA of Randy Davis, which allegedly excluded Randy as the source of the crime-scene DNA. Losko identified the relevant crime-scene evidence as Item 76.

On January 30, 2009, the trial court denied Davis's motion for leave to file a motion for a new trial. The trial court did not reach the merits of Davis's claim. Rather, the court found that Davis was not unavoidably prevented from offering his new evidence within the 120-day limit of Crim. R. 33(B). (See Dkt. 01/30/2009, Judgment Entry, p. 4.)

Davis moved the trial court to appoint Dr. Mueller as his expert. (Dkt. 02/02/2009.) In that motion, Davis also requested an order for independent testing of Item 76 by Dr. Mueller. (Davis had not yet received the trial court's final entry when he filed this motion on February 2, 2009.) Three days later, Davis moved the trial court for an order to preserve Item 76 for future testing by his expert. (Dkt. 02/09/2009.)

The trial court denied Davis's motion to appoint Dr. Mueller as an expert, and it denied the request for independent testing of Item 76. The trial court granted, however, Davis's motion to preserve Item 76. The State sent a copy of the trial court's entry to Losko on March 12, 2009. (Dkt. 03/16/2009.)

Davis timely filed a notice of appeal. The sole issue on appellate review was whether Davis satisfied the requirements of Ohio R. Crim. P. 33(B) when he sought leave from the trial court to file his new trial motion. The Fifth Appellate District denied the appeal, finding that the trial court did not have jurisdiction to consider Davis's motion.

B. Factual Background

Elizabeth Sheeler was stabbed in her Newark, Ohio, apartment on or about July 11, 2000. In 2004, Roland Davis became the primary suspect as the result of DNA evidence. “During September 2004, DNA analysis using Y-chromosome (“YSTR”) testing was conducted on the blood-stained fitted sheet from Sheeler’s bedroom. According to Megan Clement, the technical director for forensic identity testing at Laboratory Corporation of American Holdings, Inc. (“Lab Corp”), three locations of the blood stains matched Davis’s DNA profile. Further, DNA analysis using auto STR testing was conducted on two of the blood stains from the fitted sheet.” State v. Davis, 116 Ohio St. 3d 404, 408 (2008). Clement’s trial testimony indicated that the “statistical frequency of that DNA’s presence is one in 97.1 quadrillion in the Caucasian population . . . ,” leading to the conclusion that Davis was the likely source of the DNA. Id. at 408.

With this evidence before the jury, Davis was convicted of aggravated murder with three capital specifications. He was also convicted of aggravated burglary, aggravated robbery, and kidnapping. Davis was sentenced to death. This Court affirmed his convictions and death sentence on direct appeal. See id. Davis’s petition for postconviction relief was denied. State v. Davis, No. 08-CA-16, slip. op. 2008 Ohio 6841, 2008 Ohio App. LEXIS 5718 (Licking Ct. App. Dec. 23, 2008).

On October 31, 2008, Davis moved for leave to file a new trial motion. He appended an affidavit from Dr. Laurence Mueller in support of his motion. Dr. Mueller is a highly qualified expert in DNA science. (See New Trial Motion, Ex. I ¶¶ 1, 2.) His opinion was credited by the United States Court of Appeals for the Ninth Circuit in a federal habeas corpus case that resulted in a new trial. (Id. at ¶ 2.)

Dr. Mueller wrote that he “was approached by the office of the Ohio Public Defender and asked to review the State’s DNA case against Roland Davis.” (Id. at ¶ 3.) Based on his review, Dr. Mueller stated in a sworn affidavit “with a reasonable degree of scientific certainty” that the State’s DNA evidence is questionable because:

- A. Mr. Davis was identified as a suspect by using a database search; however, the State’s DNA experts did not account for the database “hit” in its statistical analysis of the DNA test results.
- B. There is no mention of the other major source of uncertainty in DNA profiling, namely laboratory error.
- C. Meghan Clement, one of the State’s DNA experts, testified that it was impossible for non-identical twin siblings to have the same DNA; however, this testimony is false.
- D. The genetic profiles developed from the bed sheets were mixed samples, with a partial profile, and the statistical analysis of the weight of this evidence by the State’s DNA experts overstated its value.

(Id. at ¶ 4.)

According to Dr. Mueller, the first defect in the State’s DNA evidence arises from a flaw in the statistical database employed by Lab Corp:

In this case the original database search utilized six loci. See Appendix A. In Lab Corp’s report there were seven new loci tested after the database search, which allows for an NRC I calculation for the bed sheet evidence. See Appendix B. Applying this technique with the FBI Caucasian database and using the same loci used by Lab Corp to estimate frequencies produces a number of 1 in 180 million. The calculation adopted by Lab Corp, however, assumes that a major donor profile can be extracted from this evidence sample. As discussed in **paragraphs 35 through 36**, this assumption is not appropriate and thus even 1 in 180 million is not sufficiently conservative.

(Id. at ¶ 14.) (Emphasis in original.) The flaw stems from identifying Davis as a DNA contributor from a “cold hit.” As Dr. Mueller explained:

The NRC II report is very explicit about its recommendation for cold hit cases. It is clear from the NRC II report that it did not intend for the use of random match

probability (RMP) to be used as a statistics for matches in cold hit cases. In chapter five of the NRC II report it states:

Thus far, we have assumed that the suspect was indentified by evidence other than DNA, such as testimony of an eyewitness or circumstantial evidence. In that case, the DNA is tested and the match probability or likelihood ratio is computed for the event that a person selected at random from some population will have the genotypic profile of the evidence sample. There is an important difference between that situation and one in which the suspect is initially identified by searching a database to find a DNA profile matching that left at a crime scene. In the latter case, the calculation of a match probability or LR **should take into account the search process.**

(Id. at ¶ 21.) (Emphasis in original.)

In this case, the towel evidence was tested on the six same loci used for the database search. Therefore, the NRC II method can be used with this sample. Using the number of offenders in the Florida offender database that produced the original “cold hit” the frequency using the NRC II method produces a frequency of 1 in 2630.

(Id. at ¶ 21.)

A survey of the published papers cited in this affidavit leads to one point of agreement: Database searches require a different approach to the statistical evaluation of matches found between evidence samples of members of the database. Further, and more importantly, a cold hit is NOT equivalent to a probable cause case.

(Id. at ¶ 25.)

Dr. Mueller also said that Clement’s testimony failed to account for laboratory error:

If anything, the frequency of these errors has been increasing over time. My interpretation of this observation is not that the quality of labs is changing but that there are more laboratories doing these types of tests and thus additional opportunities for errors to occur. For instance in May of 2005, Jerry Richardson, the Director of the Crime Laboratory for the North Carolina State Bureau of Investigation, reported a false match. See Exhibit C - May 23, 2005, Letter from Jerry Richardson to Ralph Keaton of ASCLD/LAB. According to Mr. Richardson the false match occurred when a laboratory technician switched the known samples of the victim with those of the suspect. It goes without saying that this error was contrary to laboratory protocol. Ultimately, it is important to realize that as long as humans are involved in the process of DNA typing errors will happen. It is my professional opinion, within a reasonable degree of scientific certainty, that:

(A) presenting DNA evidence without statistical weights that imply that the chance of these sorts of errors is zero is scientifically unacceptable; and

(B) the failure to include error rates and to only report a random match probability is inaccurate and misleading to the trier of fact.

(Id. at ¶ 37.)

Dr. Mueller concluded that Clement misled the jury when she said that “no two siblings have the same DNA unless they are identical twins.” (T.p. 1713.)

[A] recent study of the Arizona offender database consisting of a little over 65,000 people, identified an 11 and a 12 locus match between full siblings. In fact, the NRC II report gives simple formulas for computing the chance that full siblings will have identical profiles. Applying that formula to the six loci found in the towel evidence, the chance that a full sibling of Mr. Davis would match this profile is **1 in 490**. Applying this same formula to the 11 locus profile that Lab Corp suggests are from the major contributor to the bed sheet evidence, the chance that a full sibling of Mr. Davis would match is **1 in 260,000**.

(Id. at ¶ 38.) (Emphasis in original.)

Dr. Mueller also found that the State’s DNA evidence was overstated, based on an assumption by Lab Corp of “allelic dropout.”

Employing the methods outlined by Gil et al. (2006) and the FBI Caucasian database for evidence sample 12-4.6 This evidence sample had a total of 13 tested loci; however, since 6 were used previously in the database search, I have eliminated those from consideration as recommended by NRC I. The remaining 7 loci can be used once we fix the probability of allelic drop out. These techniques compare the probability of the State’s explanation of the evidence (e.g. the evidence is a mixture of DNA from Davis and an unknown person) to the probability of the defense explanation (e.g. the DNA is a mixture of two unknown people). Currently, there is no reliable way to estimate the probability of allelic drop out for a particular evidence sample. Accordingly, I have used a range of values from 10^{-4} to 0.9. The weight of the evidence by these techniques ranges from 1.49 million to 1 down to 15,600 to 1 in favor of the State’s hypothesis. The original testimony suggested that the State’s hypothesis was 97 quadrillion times more likely than the defense hypothesis. It is my professional opinion, which is based on reasonable degree of scientific certainty, that had the proper statistical accounting for the database search been used; the trier of fact would not have been misled about the statistical weight of this evidence.

(Id. at ¶ 43.)

The trial court ruled that Davis was not unavoidably prevented from presenting Dr. Mueller's affidavit within the 120-day limit of Ohio R. Crim. P. 33(B) and denied Davis's motion for leave to file his new trial motion. Davis appealed that ruling to the Fifth Appellate District, which affirmed the trial court's decision but did not conduct a merits review. Rather, the court of appeals held that the trial court did not have jurisdiction to hear the motion for a new trial. Davis now seeks this Court's jurisdiction and asks the Court to reverse the decision of the court of appeals.

ARGUMENT

Proposition of Law No. 1

When the issue to be decided by the trial court does not fall within the judgment on appeal, the trial court retains jurisdiction to decide the motion before it. Further, to meet due process, a trial court must be able to consider a motion for a new trial based on newly discovered evidence even after an appeal has been taken. U.S. Const. amend. XIV.

After his conviction, Appellant Roland Davis filed a motion for leave to file a new trial motion under Ohio R. Crim. P. 33(B). The basis for a new trial in this case arises from a claim of ineffective assistance of trial counsel. The evidence that compels a new trial was not presented on direct appeal or in Davis's postconviction proceedings. The trial court did not consider the merits of the claim. Instead, the court ruled that Davis did not meet the standard under Crim. R. 33(B) to show that he was unavoidably prevented from discovering the new evidence within the rule's timeframe. On appeal, the Fifth Appellate District held that the trial court did not have jurisdiction to rule on Davis's motion. (Court of Appeals Opinion 9/24/09, p. 5.)

The court of appeals improperly relied on this Court's decision in State ex rel. Special Prosecutors v. Judges, 55 Ohio St. 2d 94 (1978), to affirm the trial court's denial of Davis's new trial motion. The appellate court's decision extends the reach of Special Prosecutors. If left standing, the court's literal interpretation of this Court's holding would prohibit all post-trial motions and actions, including cases in which a capital defendant demonstrates actual innocence.

This Court's guidance is necessary to settle the confusion over how lower courts are applying Special Prosecutors to post-trial motions. It is unlikely that this Court intended such a sweeping holding. Still, several appellate courts have used Special Prosecutors erroneously to bar litigation after an appellate court has reviewed any aspect of a case. See, e.g., State v. Nicholson, No. 92498, 2009 Ohio App. LEXIS 4245, at **5 (Cuyahoga Ct. App. Sept. 24, 2009) (plea withdrawal motion); State v. Hill, No. 1-09-1226, 2009 Ohio App. LEXIS 4397, at **1 (Lucas Ct. App. Sept. 14, 2009) (plea withdrawal motion); State v. Parks, No. 08 CA 857, 2009 Ohio App. LEXIS 4095, at **4-5 (Carroll Ct. App. Sept. 10, 2009) (plea withdrawal motion); State v. Fields, No. C-080825, 2009 Ohio App. LEXIS 3566, at **5-6 (Hamilton Ct. App. Aug. 21, 2009) (postconviction petition). In Hill and Parks, the previous appeal had nothing to do with the issue raised in the later trial-court motions, which raises the question whether a trial court may act at all on post-trial motions.

There are conflicting appellate-court decisions, which lead to inconsistencies among Ohio courts in how post-trial motions are handled. See, e.g., Day v. McDonald, 67 Ohio App. 3d 240, 245 (1990) ("a trial court may entertain a properly filed motion for relief from judgment during the pendency of an appeal"); State v. Lee, 2005 Ohio 6374, 2005 Ohio App. LEXIS 5701 (Franklin App. Ct. 2005) (Crim. R. 33 motion for a new trial considered by trial court after conviction affirmed on appeal).

The issue in Special Prosecutors involved the defendant's motion to withdraw his guilty plea. The court of appeals had addressed the voluntariness of the defendant's guilty plea before the trial court decided the motion to withdraw. The court of appeals' judgment on the issue preceded the trial court's action. This Court found that "the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." Special Prosecutors, 55 Ohio St. 2d at 97.

In Davis's case, however, the specific issue of defense counsel's ineffective assistance for failing to present a DNA expert at trial to refute the testimony of the State's expert had not been decided by a higher court. The issue of trial counsel's ineffectiveness could not have been raised on direct appeal and decided by this Court because it requires evidence outside the record; that is, the affidavit of a DNA expert. This Court could not have considered such an affidavit. See State v. Ishmail, 54 Ohio St. 2d 402, 406 (1978) (on questions of law, a reviewing court is limited to the trial-court record). This Court's judgment in the direct appeal does not encompass whether defense counsel were ineffective for failing to challenge the State's DNA evidence with the trial testimony of a DNA expert, because that issue was not raised in the merit brief.¹ The affidavit of a qualified DNA expert who had reviewed the State's evidence was not presented to this Court.

When the issue has not been raised on appeal, a trial court's ruling cannot be inconsistent with the judgment of the court of appeals. In Davis's case, this Court's judgment is silent on

¹ The only issues raised on direct appeal that related to defense counsel's ineffectiveness relative to the State's DNA evidence involved counsel stipulating to the admissibility of DNA evidence at a preliminary hearing (Appellant's Merit Brief, filed 7/14/06, Prop. of Law XIII, p. 184), and counsel's failure to zealously object to the exclusion of an exhibit prepared by the State's expert (Id. at p. 192).

whether his attorneys were ineffective for failing to present relevant evidence from a qualified DNA expert. Thus, the trial court could rule on the new trial motion without undermining this Court's opinion in the case.

Ohio Rule of Criminal Procedure 33(B) even anticipates a new trial motion being filed after the case has been appealed. By allowing the defendant to argue that he was unavoidably prevented from discovering the evidence needed to support a new trial motion within the 120-day limit, the rule implies that the trial court may hear such a motion after the verdict has been appealed, since a notice of appeal to this Court must be filed within 45 days of the judgment being appealed. S. Ct. Prac. R. II § 2(A) & XIX § 1(A).

There is also statutory support for finding that trial courts have authority to hear post-trial motions. The trial court regains jurisdiction under O.R.C. § 2505.39 after a judgment is appealed:

A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings.

On March 12, 2008, this Court sent the mandate to the clerk of the trial court. Thus, the case returned to the trial court, which then had jurisdiction. Having regained jurisdiction, the trial court could take action on Davis's new trial motion, which was filed on October 31, 2008. This Court has recognized that "the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment" Special Prosecutors, 55 Ohio St. 2d at 97 (citations omitted).

This Court should grant jurisdiction and reverse the decision of the court of appeals. Davis's new trial motion raises a new issue that this Court did not address in the direct appeal. Allowing the trial court to consider the motion protects Davis's due-process rights.

Proposition of Law No. 2

A trial court errs and violates the defendant's right to due process when it denies a motion for a new trial filed beyond the time limit in Ohio R. Crim. P. 33(B) when the defendant has shown that he was unavoidably prevented from discovering the relevant new evidence. U.S. Const. amend. XIV.

The trial court properly considered Roland Davis's "Motion for Finding Defendant Was Unavoidably Prevented From Discovering New Evidence Within 120 Days Of Verdict Under Ohio R. Crim. P. 33 (B)" but came to the wrong conclusion in denying the motion. Under Ohio R. Crim. P. 33(B), a new trial motion based on newly discovered evidence must be filed within 120 days of the verdict unless "[i]t 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 court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." See also State v. Petro, 148 Ohio St. 505, syl. (1947); O.R.C. §§ 2945.79(F), 2945.80.

Davis's new trial motion asserts that his trial counsel were ineffective because they failed to properly challenge the State's DNA evidence. Davis could not raise this claim at trial because his trial attorneys could not be expected to present evidence of their own ineffectiveness. See State v. Lentz, 70 Ohio St. 3d 527, 529 (1994) ("counsel cannot realistically be expected to argue his own incompetence") (citation omitted).

Davis also could not have raised this claim on direct appeal. His claim depends on the expert affidavit of Dr. Mueller. This affidavit is evidence outside the record that cannot be considered in a direct appeal. See State v. Ishmail, 54 Ohio St. 2d 402, 406 (1978). See also State v. Hawkins, 66 Ohio St. 3d 339, 350 (1993) (new trial motion is proper when new evidence "has been discovered since the trial") (citation omitted).

The availability of postconviction review under O.R.C. § 2953.21 presented no bar to the trial court's review of Davis's new trial motion. Criminal Rule 33 has a 120-day filing deadline, but the postconviction statute requires that the defendant's petition be filed within 180 days after the record is filed in the direct appeal. O.R.C. § 2953.21(A)(2). Because a postconviction investigation is allotted 180 days, relevant evidence may not be discovered until after the deadline set in Crim. R. 33. A timely postconviction petition may be properly filed outside the 120-day limit of Crim. R. 33.

Also, postconviction is not the forum for claims of innocence. State v. Watson, 126 Ohio App. 3d 316, 323 (1998). The State argued this point in its brief opposing Davis's postconviction appeal, asserting that "[a] claim of actual innocence is not a ground for post-conviction proceedings." (Postconviction Brief of State of Ohio, State v. Davis, No. 08-CA-16, p. 26, filed August 19, 2008.) See also State v. Lee, No. 05AP-229, 2005 Ohio App. LEXIS 5701, at **6-8 (Franklin Ct. App. Dec. 1, 2005) ("the Crim.R. 33(B) procedure for new trial motions exists independently from the R.C. 2953.21 procedure for post-conviction petitions").

Trial counsel's ineffective performance resulted in a wrongful conviction. A new trial motion is the vehicle to pursue such a claim. Davis was entitled to a merits of review of his new trial motion because his newly discovered evidence shows that his convictions and death sentence are a miscarriage of justice arising from a violation of his Sixth Amendment right to effective assistance of counsel. See Schlup v. Delo, 513 U.S. 298, 326-27 (1995).

CONCLUSION

Appellant Roland Davis was unavoidably prevented from filing a motion for a new trial within the time limits of Ohio R. Crim. P. 33(B). The trial court properly considered the motion but erred in finding that Davis did not meet the requirements of Crim. R. 33(B). This Court should accept jurisdiction to hear this case, reverse the decision of the court of appeals, and remand this case to the common pleas court for further consideration.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. mail to Kenneth Oswalt, Prosecuting Attorney, Licking County, Admin. Bldg., 20 South Second Street, Newark, Ohio 43055 on the 6th day of November, 2009.



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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

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STATE OF OHIO

Plaintiff-Appellee

-vs-

ROLAND DAVIS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J. CLERK OF COURTS
OF APPEALS
Hon. William B. Hoffman, LICKING COUNTY OH
Hon. Patricia A. Delaney, JGARY R. WALTERS

Case No. 09-CA-0019

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Licking County, Ohio, Case No. 04-CR-464

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Hoffman, J.

{¶1} Defendant-appellant Roland Davis appeals the January 30, 2009 Judgment Entry entered by the Licking County Court of Common Pleas, denying his motion for leave to file a motion for a new trial upon finding he was not unavoidably prevented from discovering new evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On July 8, 2005, a Licking County jury found Appellant guilty of aggravated murder, kidnapping, aggravated robbery, and aggravated burglary. Following the mitigation phase of the trial, the jury recommended Appellant be sentenced to death. The charges arose from the July, 2000 death of 86 year old Elizabeth Sheeler by an intruder into her apartment. The murder went unsolved for almost four years and became a cold case. In 2004, DNA testing identified Appellant as the murderer. Appellant appealed to the Ohio Supreme Court, which upheld his convictions and the imposition of the death sentence. *State v. Davis*, supra. Appellant filed a petition for certiorari with the United States Supreme Court, which was denied on October 6, 2008.

{¶3} Appellant subsequently filed a petition for post-conviction relief. The State filed its answer to the petition as well as a motion for summary judgment. Appellant filed a response to the State's motion to dismiss and filed a motion for leave to respond to the State's motion for summary judgment. Thereafter, Appellant filed a number of other motions, which the State opposed. The State filed a supplemental motion for

¹ A thorough rendition of the facts underlying Appellant's convictions and sentence can be found in *State v. Davis*, 116 Ohio St.3d. 404, 2008-Ohio-2.

summary judgment on November 8, 2007. Appellant mailed his response to the supplemental summary judgment motion, however, the trial court issued its findings of fact and conclusions of law on that same day. The trial court issued its Final Judgment Entry, granting the State's Motion for Summary Judgment on January 14, 2008. Appellant appealed to this Court, which affirmed. *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841.

{¶4} On October 31, 2008, Appellant filed a motion requesting the trial court to find he was unavoidably prevented from discovering new evidence within 180 days of verdict under Ohio Crim.R. 33(B) and, if so found, leave to file a motion for a new trial. Therein, Appellant explained his newly discovered evidence was the affidavit of DNA expert, Dr. Laurence Mueller, a professor in the Ecology and Evolutionary Biology Department at the University of California, Irvine. Appellant asserted Dr. Mueller's affidavit undermined the State's DNA evidence which was essential to its case against Appellant. Appellant concluded because his trial counsel was ineffective for failing to properly challenge the State's DNA evidence, a miscarriage of justice resulted and he was entitled to a merit review of his motion for new trial. The State responded, arguing Appellant's motion was defective both procedurally and substantively. Specifically, the State maintained the trial court lacked jurisdiction to entertain the motion due to a pending appeal of the trial court's denial of his petition for post-conviction relief; the motion for new trial was barred by the doctrine of res judicata; and the evidentiary material offered by Appellant in support of his motion was not "newly discovered".

{¶5} Via Judgment Entry filed January 2, 2009, the trial court denied Appellant's request to find he was unavoidably prevented from discovering new

evidence. The trial court found Appellant failed to demonstrate why he was unable to obtain the “newly discovered” evidence within the timeframe prescribed in Crim.R. 33(B). The trial court also found Appellant failed to demonstrate, but for trial error, to wit: the unavailability of Dr. Mueller’s testimony, no reasonable factfinder would have found him guilty.

{¶6} It is from this judgment entry Appellant appeals, raising as his sole assignment of error:

{¶7} “I. THE TRIAL COURT VIOLATED APPELLANT’S DUE PROCESS RIGHTS WHEN IT DENIED HIS REQUEST FOR LEAVE TO FILE A NEW TRIAL MOTION. U.S. CONST. AMEND. XIV.”

I

{¶8} Herein, Appellant maintains the trial court erred in denying his request for leave to file a motion for new trial as the trial court’s finding he was not unavoidably delayed in discovering new evidence was erroneous.

{¶9} We begin by addressing the threshold issue of whether the trial court had jurisdiction to act on Appellant’s motion for new trial.

{¶10} In *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, the Supreme Court of Ohio granted the relator’s request for a writ of prohibition to prevent the trial court from granting a motion to withdraw a guilty plea and conducting a new trial. The Court held the trial court lost jurisdiction to grant a motion to withdraw a guilty plea and grant a new trial when the defendant lost the appeal of his conviction based upon a guilty plea. *Id.* at 97.

{¶11} The Ohio Supreme Court further held the trial court did not regain jurisdiction subsequent to the court of appeals' decision affirming the defendant's conviction. *Id.* The Court reasoned allowing the trial court to consider a Crim.R. 32.1 motion to withdraw a guilty plea subsequent to an appeal and affirmance by the appellate court "would affect the decision of the reviewing court, which is not within the power of the trial court to do." *Id.* at 97-98. Thus, the Supreme Court found "a total and complete want of jurisdiction by the trial court to grant the motion to withdraw [the defendant's] plea of guilty and to proceed with a new trial." *Id.* at 98.

{¶12} For the same rationale set forth in *Special Prosecutors*, we find the trial court's granting of Appellant's motion for new trial would be inconsistent with the judgment of the Ohio Supreme Court, affirming Appellant's convictions and sentence. Accordingly, we find the trial court was without jurisdiction to entertain Appellant's motion for new trial subsequent to the Ohio Supreme Court's decision.

{¶13} Because the trial court was without jurisdiction to hear Appellant's motion for new trial, we find the trial court did not err in denying Appellant's request for leave to file said motion.

{¶14} Appellant's sole assignment of error is overruled.

{¶15} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROLAND DAVIS

Defendant-Appellant

JUDGMENT ENTRY

Case No. 09-CA-0019

For the reason stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY