

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2015-1269
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
ANGELO HOWARD	:	Court of Appeals Case Number C-140516
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

Joseph T. Deters (0012084P)  
Prosecuting Attorney

Sean M. Donovan (0086528P)  
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3130  
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

Sarah M. Schregardus  
Attorney at Law  
492 City Park Ave.  
Columbus, Ohio 43215  
(614) 628-0100

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

The issues raised by defendant-appellant have already been resolved by this Court and other Ohio Courts. No issue of great public or general interest is presented, nor does any substantial constitutional question exist. And significantly, there is no constitutional right to successive re-openings of one's direct appeal. Jurisdiction is properly denied.

**STATEMENT OF THE CASE AND FACTS**

Howard was indicted in the case numbered B-0703493-A for offenses relating to the murders of Gino Booker and Tim Canady. In the case numbered B-0806325-A, Howard was indicted for offenses relating to the murders of Kevin Johnson and Devin Redding. (T.d. 1)

A jury found Howard guilty of all offenses and accompanying specifications in the case numbered B-0703493-A. (T.d. 301-18) With respect to the offenses in the indictment in the case numbered B-0806325-A, Howard was found guilty of the aggravated murder, aggravated robbery, and kidnapping of Kevin Redding. (T.d. 116) But he was acquitted of the aggravated murder and aggravated robbery of Kevin Johnson. (T.d. 114)

On direct appeal, Howard's conviction for the murder of Redding was reversed, but the trial court's judgment was affirmed in all other respects. (T.d. 332)

Howard filed a motion for leave to file a motion for a new trial as to the murder of Tim Canady. (T.d. 336) In denying that motion, the trial court found; the motion was filed well outside the 120 day time limit, Howard failed to demonstrate he was unavoidably prevented from discovering the "new" evidence, and there was no strong possibility the evidence would change the result. (T.d. 340) The Court of Appeals affirmed on June 17, 2015.

**Facts:**

In the early morning hours of December 14, 2002, Howard and his accomplices broke into the home of Krystal White, seized Timothy Canady and began beating him severely.<sup>1</sup> They tied up the remaining occupants of the home and put them in the basement. (T.p. 1101) They handcuffed Canady, dragged him from the house and forced him into his own truck.<sup>2</sup> They beat Canady until he told them he had marijuana in an apartment in Clifton.

Howard and Andre Thomas forced entry into the apartment of Sakinah Malik, took Canady's marijuana, and left Malik tied up in the apartment. (T.p. 856-59) Once outside, Howard shot Canady in the back of the head, while he was still handcuffed, killing him. (T.p. 1095) Eugene Jackson was standing directly next to Howard and witnessed the execution.

At trial, Eugene Jackson and Carlos Jackson testified about Howard's involvement in this series of offenses. Andre Thomas was also called as a State's witness, but recanted his statements to police, and exculpated Howard.

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<sup>1</sup> Video deposition of Carlos Jackson, July 30, 2009 @ 36-37

<sup>2</sup> Video deposition of Carlos Jackson, July 30, 2009 @ 38

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### **PROPOSITION OF LAW: HOWARD FAILED TO PROVE HE WAS UNAVOIDABLY PREVENTED FROM DISCOVERING THE “NEW” EVIDENCE AND THE TRIAL COURT PROPERLY DENIED HIS MOTION FOR LEAVE.**

In his sole proposition of law, Howard asserts the trial court abused its discretion when it denied him leave to file an untimely Motion for New Trial because he demonstrated his actual innocence.

Crim.R. 33 permits a trial court to grant a new trial on the ground that “new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at trial.”<sup>3</sup> A motion for new trial must be filed either within 120 days of the return of the verdict or within seven days after the trial court, upon “clear and convincing proof that the defendant [had been] unavoidably prevented from discovering the evidence” within the 120-day period, grants leave to file a new-trial motion out of time.<sup>4</sup>

The defendant bears the burden of showing he had no knowledge of the existence of the new evidence and could not have learned of its existence within the prescribed time limit through the exercise of reasonable diligence.<sup>5</sup> In order to warrant an evidentiary hearing on a motion for new trial, the defendant must make a *prima facie* showing of unavoidable prevention.<sup>6</sup> In other words, “the defendant must present that evidence; the judge is not required to make suppositions about the reasons for the delay.”<sup>7</sup> This Court reviews the denial of a Crim.R. 33 motion for abuse of discretion.<sup>8</sup>

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<sup>3</sup> Crim. R. 33(A)(6).

<sup>4</sup> *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶ 16; *State v. Roberts* (2001), 141 Ohio App.3d 578, 582, 752 N.E.2d 331.

<sup>5</sup> *Id.*, at ¶ 16, quoting *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146.

<sup>6</sup> *State v. Carusone*, 2013-Ohio-5034, ¶ 33

<sup>7</sup> *State v. Fortson*, 2003-Ohio-5387, ¶ 12

<sup>8</sup> *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227, (1993).

In this case, more than four years after he was found guilty of Canady's murder, Howard offered the affidavit of Andre Thomas, partially recanting his trial testimony, and claiming he was the actual shooter. To support his claim of unavoidable prevention, Howard offered only the date of Thomas' affidavit. Howard failed to document any diligence in attempting to discover this evidence earlier, much less the "reasonable" diligence necessary to satisfy Crim.R. 33(A)(6).

The fact that Andre Thomas recanted his statements to police that Howard shot Timothy Canady is not news to Howard. Thomas was a State's witness, who was expected to testify that Howard had shot and killed Timothy Canady. He had given a statement to police detailing just that.<sup>9</sup> But Thomas surprised the State at trial by recanting his statement and claiming Howard had nothing to do with Canady's murder.<sup>10</sup> This put Howard on notice that Thomas was ripe for diligent investigation. But Howard took no action to investigate Thomas' change of heart. Nor does he recount any efforts he made over the intervening four years to investigate Thomas' story.

In support of his claim of unavoidable prevention, Howard offered only that Thomas did not come forward with the "new" information until July 18, 2013, more than three years after the jury verdict. Additionally, his motion for leave was not filed for another 218 days after the "new" information was discovered. Howard offered no explanation for the delays, and asked the Court to speculate as to the reasons for these delays.

Howard was represented by counsel at trial, and on direct appeal. The record is devoid of any steps taken to unearth the new evidence. The fact that the affidavit was filed more than three years late does not prove unavoidable prevention, only untimely filing. Howard failed to meet his burden of proving unavoidable prevention.

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<sup>9</sup> Andre Thomas Interview 4-16-08

<sup>10</sup> *T.p.* 1037-38

Even if he were granted leave to file an untimely motion for new trial, said motion would be properly denied as well. Ohio courts have set forth standards of review for courts that are considering a motion for a new trial. *State v. Petro* sets forth six requirements a defendant must satisfy to prevail on a motion for a new trial:

“To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.”<sup>11</sup>

When a motion for a new trial is based on the recantation of a witness’s testimony, as here, Ohio Courts have consistently held that such testimony is inherently suspicious and must be scrutinized for truthfulness. In *Taylor v. Ross* the Ohio Supreme Court stated that an affidavit in which the affiant recants, or otherwise changes his prior sworn testimony, is entitled to little weight.<sup>12</sup> The Supreme Court wrote, “Recanting testimony ordinarily is unreliable and should be subjected to the closest scrutiny.”<sup>13</sup> This Court cited with approval from a New York case, “[t]here is no form of proof so unreliable as recanting testimony.”<sup>14</sup> Additionally, a trial court is not required to accept all affidavits as true, “but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact.”<sup>15</sup>

Applying the law to the present case, Howard’s newly discovered evidence failed to meet at least two of the six *Petro* requirements; it did not disclose a strong probability a new trial would have a different outcome, and it merely impeached or contradicted former evidence.

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<sup>11</sup> *State v. Petro*, 148 Ohio St. 505, 505, 76 N.E.2d 370, 371 (1947)

<sup>12</sup> *Taylor v. Ross*, 150 Ohio St. 448, 83 N.E. 222, (1948).

<sup>13</sup> *Id.* at syllabus, paragraph 3.

<sup>14</sup> *State v. Curnutt*, 84 Ohio App. 101, 84 N.E. 230, (1948), citing from *People v. Shilitano*, 218 N. Y. 161, 112 N. E. 733, L. R. A. 1916F 1044

<sup>15</sup> *State v. Calhoun*, 86 Ohio St. 3d 279 at 284, (1999).

Howard's "new" evidence was Thomas' affidavit, exculpating Howard of Timothy Canady's murder. This is not new information. Thomas already exculpated Howard at his trial in 2010.<sup>16</sup> The jury already knew he pled guilty to killing Canady, and he claimed Howard had nothing to do with it.<sup>17</sup> And that jury convicted Howard. The only difference in the "new" evidence is that he took his testimony one step further and now claimed he was not just involved, but rather was the shooter.

In support of this new assertion, Thomas offered that he killed Canady because Canady mistakenly believed Howard was involved. He feared Howard would retaliate against him if he allowed Canady to spread this false information.<sup>18</sup> This was Thomas' third version of events and it is unlikely a jury would find this version any more believable than his second. This is especially true in light of the fact that jeopardy had already attached to Thomas' involvement in this matter and he risked precious little by "confessing" now.

Because the new evidence offered was highly suspect and offered an implausible storyline, Howard cannot show a strong probability the outcome of a new trial would be any different. The jury did not believe Thomas the first time, and his most recent version of events is even less believable than his last. Additionally, the new evidence was cumulative of that already heard and was offered to impeach prior testimony. For these reasons, even if it were allowed, Howard's motion for a new trial would be properly denied.

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<sup>16</sup> T.p. 1037-1038

<sup>17</sup> T.p. 1308

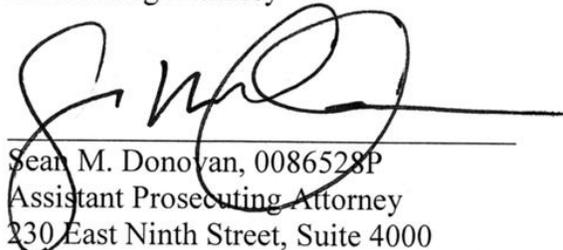
<sup>18</sup> Thomas Affidavit ¶ 8

**CONCLUSION**

Plaintiff-Appellee submits that jurisdiction is properly denied.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

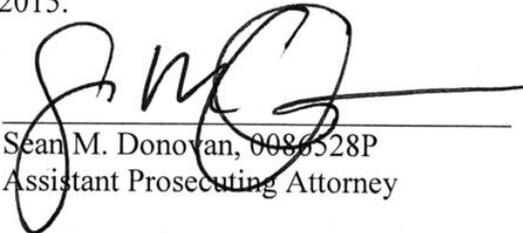


Sean M. Donovan, 0086528P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: (513) 946-3130

Attorneys for Plaintiff-Appellee, State of  
Ohio

**PROOF OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Sarah M. Schregardus, 492 City Park Ave., Columbus, Ohio 43215, counsel of record, this 24 day of August, 2015.



Sean M. Donovan, 0086528P  
Assistant Prosecuting Attorney