

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	M E M O R A N D U M
	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-T-0090
ALFONSIA M. PERRY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 94 CR 42.

Judgment: Appeal dismissed.

Dennis Watkins, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Alfonsia M. Perry, pro se, PID# 300-444, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, OH 45601 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Alfonsia M. Perry, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, denying his Motion for New Trial. For the following reasons, we dismiss the appeal of the Judgment below.

{¶2} On November 7, 1994, Perry was convicted by a Trumbull County jury of Aggravated Murder, and sentenced to life imprisonment. Perry's conviction was

affirmed on direct appeal. See *State v. Perry*, 11th Dist. No. 94-T-5165, 1997 Ohio App. LEXIS 3884.

{¶3} On October 17, 2008, Perry filed a Motion for New Trial, pursuant to Crim.R. 33. In this Motion, Perry raised the following arguments.

{¶4} The proceedings at trial were structurally defective in that the trial court did not comply with Superintendence Rule 20 (former Rule 65) regarding the appointment of counsel in capital cases.

{¶5} Trial counsel, Maridee Costanzo, was constitutionally ineffective. She failed to raise objections to exculpatory evidence being destroyed, improper jury instructions, the jury's view of the crime scene, and testimony from the coroner that was not based on personal knowledge. Additionally, trial counsel failed to call an independent psychologist to testify. Perry noted that, about eleven years after his trial, trial counsel was convicted of state and federal crimes and suspended from the practice of law. *In re Costanzo*, 106 Ohio St.3d 1525, 2005-Ohio-5296.

{¶6} The prosecuting attorney committed prosecutorial misconduct by having children present in the courtroom during his step-son's testimony. This prosecutor was subsequently suspended from the practice of law. See *Office of Disciplinary Counsel v. Sopkovich*, 75 Ohio St.3d 192, 1996-Ohio-218.

{¶7} Coroner Joseph Soboslay gave testimony based on reports prepared by another forensic scientist.

{¶8} Coroner William Cox, a witness for the State, was subsequently convicted of violating ethics laws.

{¶9} The State's Psychologist, Keith Smedi, was subsequently charged with unethical conduct by the State Board of Psychology.

{¶10} On September 1, 2009, the trial court entered a Judgment Entry denying Perry's Motion for New Trial. The court held that the Motion was untimely and Perry failed to establish, by clear and convincing evidence, that "he was unavoidably prevented from the discovery of any new evidence in this case." The court further noted that Perry was not charged with capital Murder and, thus, former Superintendence Rule 65 did not apply.

{¶11} The trial court held that Perry's claims of ineffective assistance of counsel were barred by res judicata and Perry failed to demonstrate prejudice as a result of trial counsel's alleged deficiencies.

{¶12} Finally, the trial court noted that Perry failed to make any connection between the subsequent misconduct and ethical issues involving the attorneys and certain witnesses in his case and the actual conduct of his trial.

{¶13} On September 21, 2009, Perry filed his Notice of Appeal.

{¶14} Perry has failed to file an appellate brief, as required by Appellate Rule 16 and Local Rule 16. Accordingly, this appeal is subject to dismissal. App.R. 18(C) and Local Rule 16(E).

{¶15} Perry has argued the merits of his appeal, however, in a number of filings with this court which cannot properly be considered an appellate brief. Were this court inclined to consider the merits of Perry's Motion, the trial court's Judgment would still be affirmed on account of its untimeliness.

{¶16} Applications for new trial must be “filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived.” Crim.R. 33(B). Where the application is based upon newly discovered evidence, it must “be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived.” Crim.R. 33(B). “If 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 court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.” Crim.R. 33(B).

{¶17} In the present case, the trial court found that Perry had failed to demonstrate that he was “unavoidably prevented from the discovery of the evidence” on which his Motion for New Trial is based. Our review of the Motion and Perry’s arguments confirms the trial court’s conclusion.

{¶18} For the foregoing reasons, this appeal is dismissed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.