

[Cite as *State v. Barnette*, 2016-Ohio-3248.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 15 MA 0160
V.)	
)	OPINION
LORENZA BARNETTE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2009 CR 1122
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JUDGMENT:	Affirmed
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APPEARANCES:	
For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6 th Floor Youngstown, Ohio 44503

For Defendant-Appellant	Lorenza Barnette, Pro-se #A620-463 Marion Correctional Institution P.O. Box 57 Marion, Ohio 43301-0057
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JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: May 24, 2016

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DONOFRIO, P.J.

{¶1} Defendant-appellant, Lorenza Barnette, appeals from a Mahoning County Common Pleas Court judgment denying his untimely motion for a new trial.

{¶2} On October 1, 2009, a Mahoning County Grand Jury indicted appellant on two counts of aggravated murder in violation of R.C. 2903.01(A)(F) with death penalty specifications; two counts of aggravated murder in violation of R.C. 2903.01(B)(F) with death penalty specifications; two counts of kidnapping in violation of R.C. 2905.01(A)(2); two counts of aggravated robbery in violation of R.C. 2911.01(A)(3)(c); and arson in violation of R.C. 2909.03(A)(1)(B)(2). These charges stemmed from the allegations that appellant, along with his co-defendants, murdered Jaron Roland and Darry Woods while committing or attempting to commit a robbery and left their bodies in a car, which he then set on fire.

{¶3} The matter proceeded to a jury trial where the jury convicted appellant of all four counts of aggravated murder, two counts of kidnapping, and one count of arson. The jury found him not guilty on both counts of aggravated robbery.

{¶4} During mitigation, the jury found that the aggravating circumstances did not outweigh the mitigating factors. Therefore, they did not recommend the death penalty. For the aggravated murder convictions, the trial court sentenced appellant to life imprisonment without parole on counts one and three and merged counts two and four with them respectively. It sentenced appellant to ten years on each of the kidnapping counts and 18 months on the arson count. The court ordered all sentences to be served consecutively.

{¶5} Appellant filed a direct appeal with this court. *State v. Barnette*, 7th Dist. No. 11 MA 196, 2014-Ohio-5673, appeal not allowed, 143 Ohio St.3d 1405, 2015-Ohio-2747, 34 N.E.3d 133. We affirmed his conviction.

{¶6} Appellant next filed an application for reopening with this court. *State v. Barnette*, 7th Dist. No. 11 MA 196, 2015-Ohio-1280. Because appellant did not establish good cause for his delay in filing the application for reopening, nor did he attach a sworn statement as required by App.R. 26, we denied the application. *Id.* at ¶ 6.

{¶7} Next, appellant filed a pro se motion in the trial court for leave to file a

delayed motion for new trial. Appellant alleged he had discovered new evidence, that being the testimony of Rayshaun Powell. He attached Powell's affidavit to his application.

{¶18} On August 28, 2015, the trial court overruled appellant's motion without a hearing.

{¶19} Appellant filed a timely notice of appeal on September 14, 2015. Still acting pro se, appellant now raises two assignments of error.

{¶110} Appellant's first assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION BY
OVERRULING APPELLANT'S MOTION FOR LEAVE TO FILE A
DELAYED MOTION FOR NEW TRIAL BECAUSE THE COURT'S
JUDGMENT ENTRY [sic.] MADE NO MENTION OF WHETHER IT
FOUND THAT APPELLANT WAS UNAVOIDABLY PREVENTED
FROM DISCOVERING THE NEWLY DISCOVERED EVIDENCE.

{¶111} Appellant argues here that the trial court failed to make a determination as to whether he was unavoidably prevented from discovering the new evidence, that being the affidavit of Rayshaun Powell. Appellant contends he had no prior knowledge of the existence of the grounds supporting his motion and could not have learned of their existence within the time prescribed for filing the motion.

{¶112} A trial court's decision to grant or deny a new trial on grounds of newly discovered evidence is within the court's sound discretion. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). Therefore, we will not reverse such a decision absent an abuse of discretion. Abuse of discretion connotes more than an error of law or judgment; it implies the trial court's judgment was arbitrary, unreasonable, or unconscionable. *State v. Adams*, 62 Ohio St. 151, 157, 56 N.E.2d 654 (1980).

{¶113} In this case, the trial court denied appellant leave to file a delayed motion for new trial. Thus, we must examine the timeliness of appellant's motion.

{¶114} Crim.R. 33(B) addresses timeliness when the basis of a new trial

motion is newly discovered evidence:

Motions for new trial on account of newly discovered evidence shall 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. 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.

{¶15} Because appellant's motion was filed well outside the 120-day period, he was required to obtain leave of court to file his motion for new trial.

{¶16} Leave of court must be granted before the merits of the motion are reached. *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶ 25 (7th Dist.). The moving party must prove unavoidable delay by clear and convincing evidence in order to obtain leave. *Id.* at ¶ 26; Crim.R. 33(B). 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.* citing, *State v. Walden*, 19 Ohio App.3d 141, 146, 1483 N.E.2d 859 (10th Dist.1984). The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Fortson*, 8th Dist. No. 82545, 2003-Ohio-5387, ¶ 12.

{¶17} Powell's affidavit provided the following. He met appellant on June 29, 2015, while they were both incarcerated at the Ross Correctional Institution. When Powell learned that appellant was from Youngstown, he told appellant "what Damon Clark did." Powell did not know appellant or Clark before they were incarcerated. He felt that telling appellant about Clark was the "right thing to do as a "Jehonah [sic.] Witness."

{¶18} According to Powell, Damon Clark confided in him that he coerced and manipulated his cousin Alfonda Madison and Madison's friend Asa Bush into implicating appellant in the double homicide. According to Powell, the three men, Clark, Madison, and Bush, came up with a plan to get revenge on their cousin Joseph Moreland¹ for testifying against Clark. The three men "came up with multiple statements" to get Moreland arrested and to get Madison and Bush some relief from the charges they were facing. Clark told Powell that appellant is innocent. Clark further told Powell that appellant "should of went with the statements Alfonda Madison and Asa Bush first gave, clearing his name putting the blame on Joseph Moreland and some other guys." Finally, Clark told Powell that because appellant did not cooperate with their plan to put Moreland in prison, Madison and Bush gave perjured testimony at appellant's trial that contradicted the first statements they gave to police that did not implicate appellant.

{¶19} As support for his showing of being "unavoidably delayed" in discovering Powell's testimony, appellant simply provided that: (1) he had no knowledge of the existence of Rayshaun Powell prior to July 29, 2015; (2) he did not become aware that Powell had information that made him a potential witness until July 29, 2015; and (3) Powell's information about how Asa Bush and Alfonda Madison (two of the prosecution's witnesses) were coerced could have changed the outcome of appellant's trial. (Motion for Leave to File Delayed Motion for New Trial).

{¶20} Appellant does not provide clear and convincing evidence for being unavoidably delayed in filing his motion.

{¶21} First, even though appellant may not have met Powell until July 29, 2015, appellant knew Clark. (Appellant affidavit). Appellant told Powell that he knew Clark because Clark was his co-defendant's cousin. (Appellant affidavit). All of the information Powell purported to know came from Clark's statements to him. Powell had no knowledge of the crimes otherwise. And since appellant has known Clark all along, he could have sought information from him.

{¶22} Along the same lines, Powell does not possess any information that

¹ Joseph Moreland ("Poochie") was also implicated in the murders.

makes him a potential witness as appellant alleges. Powell may possess information that makes Clark a potential witness. But the statements Clark allegedly made to Powell are hearsay statements that Powell would not be permitted to testify to at a trial.

{¶23} Finally, Powell's information about how Bush and Madison were "coerced" would not have changed the outcome of appellant's trial.

{¶24} At trial, Bush testified that appellant and Moncrief committed the murders. (Vol. III, Tr. 507-511). However, it was brought out that when Bush initially talked to police, he implicated Moreland and Dajaun as the ones who had committed the murders. (Vol. III, Tr. 516-517). Bush stated he was afraid of Moreland and wanted him to be arrested because he had a better chance of surviving if Moreland was incarcerated. (Vol. III, Tr. 517). It was also brought out that the second time Bush talked to police, he told them it was appellant and Moncrief who committed the murders but that Moreland had ordered the murders. (Vol. III, Tr. 518-519). Additionally, it was brought out that Bush was looking for a deal with prosecutors on charges he was facing. (Vol. III, Tr. 525-526). Bush admitted that he was facing a possible 46 years in prison, but he entered a deal to cooperate in this case and in exchange he was only sentenced to four years in prison. (Vol. III, Tr. 526-530).

{¶25} Madison also testified that appellant and Moncrief committed the murders. (Vol. V, Tr. 768-770). He admitted, however, that he initially told police that appellant tried to stop the murders and was not aware of what was going on and that Moncrief and Moreland were the ones who put duct tape and plastic bags on the victims. (Vol. V, Tr. 789-790). He stated that he made these false statements because he feared for his life since appellant was already in jail and Moncrief and Moreland were not. (Vol. V, Tr. 794). Moreover, Madison testified that he too received a deal from the state in exchange for cooperating in this case. (Vol. V, Tr. 782-784).

{¶26} According to Powell's affidavit, Clark, Madison, and Bush came up with a plan to get revenge on Moreland for testifying against Clark. They came up with statements to get Moreland arrested. Because appellant did not cooperate with their

plan to put Moreland in prison, Madison and Bush gave perjured testimony at appellant's trial implicating appellant as the murderer.

{¶27} The statements in the affidavit, even if they were admissible, would not have changed the outcome of appellant's trial. Both Madison and Bush changed their accounts of who committed the murders. The jury heard this. The jury also knew that Madison and Bush received breaks in the charges/sentences they were facing in other cases in exchange for their testimony against appellant. Thus, the jury was well aware that Madison and Bush both lied to police and changed their stories and that they were benefitting themselves by testifying against appellant. Thus, testimony that Madison and Bush lied to police and changed their stories would not have been new information for the jurors to consider. Therefore, it would not have changed the outcome of appellant's case.

{¶28} For all of these reasons, the trial court did not abuse its discretion in denying appellant leave of court to file a delayed motion for a new trial.

{¶29} Accordingly, appellant's first assignment of error is without merit.

{¶30} Appellant's second assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING
TO HOLD A HEARING ON APPELLANT'S MOTION FOR LEAVE TO
FILE A DELAYED MOTION FOR A NEW TRIAL.

{¶31} Appellant contends that he was at least entitled to a hearing on his motion. He asserts he submitted documents, which on their face, supported his claim that he was unavoidably prevented from timely discovering the evidence.

{¶32} It is within the trial court's discretion to determine whether or not it is necessary to hold an evidentiary hearing on a defendant's request for leave to file a delayed motion for new trial. *State v. Hill*, 8th Dist. No. 102083, 2015-Ohio-1652, ¶ 16.

{¶33} Noticeably, appellant did not provide Clark's affidavit. Instead, he presented Powell's affidavit. Powell had absolutely no independent knowledge of the crimes. He even stated that he did not meet appellant or Clark until he was

incarcerated. This raises suspicion as to what Clark may have told Powell. See *State v. Tucker*, 8th Dist. No. 98685, 2013-Ohio-2527, ¶ 36.

{¶34} Moreover, as discussed above, Powell's testimony regarding what Clark told him would not be admissible in a new trial. Powell's statements in the affidavit were entirely based on hearsay. There is not a single statement that Powell could testify to in a new trial. Powell has no independent information. Everything that he states in the affidavit is what Clark supposedly told him. At least one other court has held that when an appellant presents an affidavit containing only hearsay statements that would be inadmissible at trial, the trial court is correct in finding the appellant cannot establish a strong probability of a different result if a new trial was granted. *State v. McGhee*, 2d Dist. No. 24719, 2012-Ohio-2799, ¶ 12-13.

{¶35} Given the fact that appellant did not present any evidence in the affidavit that could be admissible at trial and the fact that even if the evidence was admissible it would not change the outcome of the trial, we cannot conclude that the trial court abused its discretion in failing to hold a hearing on appellant's application for leave to file a delayed motion for a new trial.

{¶36} Accordingly, appellant's second assignment of error is without merit.

{¶37} For the reasons stated above, the trial court's judgment is hereby affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.