

[Cite as *State v. Stevens*, 2010-Ohio-556.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 23236 and 23315
v.	:	T.C. NO. 96 CR 395
JEFFREY E. STEVENS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 19th day of February, 2010.

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JEFFREY E. STEVENS, #A339-120, Warren Correctional Institute, P. O. Box 120, Lebanon, Ohio 45036
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the consolidated Notices of Appeal of Jeffrey E. Stevens, filed February 4, 2009 and March 11, 2009. Stevens was convicted by a Montgomery County Jury of three counts of aggravated robbery, one count of attempted aggravated murder, and one count of aggravated murder; all counts included a firearm

specification and a prior aggravated felony specification. Stevens' motion for a mistrial and two motions for a new trial were denied, as was his direct appeal. *State v. Stevens* (April 3, 1998), Montgomery App. No. 16509. On July 13, 2007, Stevens filed a Motion for Leave to File a Delayed Motion for New Trial, supported by the affidavits of Marcus Pitts, Othello Harrell and William Brown. That motion was denied. Stevens appealed, and his appeal was denied as untimely. *State v. Stevens* (Nov. 29, 2007), Montgomery App. No. 22449.

{¶ 2} On August 13, 2008, Stevens filed a Motion for a new Trial, along with the affidavits of Marcus Pitts, Michael Stroud, Rifat Abuhilwa and Joseph Allen, in support. He filed the same motion on August 26th. Stevens did not file a motion requesting leave to file outside the statutory period. On February 19th, in overruling his motions, the trial court determined that Stevens, pursuant to Crim.R. 33,"has not established by clear and convincing evidence that he was unavoidably prevented from discovering the evidence presented in his Motion for New Trial."

{¶ 3} On August 13, 2008, Stevens also filed a Motion to Dismiss based upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 [*Colon I*], and he filed the identical motion again on August 26, 2008. The trial court overruled his motions to dismiss on January 8, 2009, and on February 19, 2009.

{¶ 4} In overruling his motions to dismiss, the trial court determined as follows:

{¶ 5} "Upon reconsideration, the Ohio Supreme Court clarified its previous decision. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 [*Colon II*]. First, the holding in *Colon I* is only prospective in nature and is applicable only to cases pending on the announcement date.

{¶ 6} “Moreover, the facts that led to *Colon I* were unique. *Id.*, ¶ 6. Since any potential defect in Mr. Stevens[’] indictment did ‘not result in multiple errors that are inextricably linked to the flawed indictment,’ a structural error analysis is not appropriate.

{¶ 7} Stevens appeals from the trial court’s decisions of January 8, 2009, denying his motion to dismiss, and February 19, 2009, denying his motion for a new trial.

{¶ 8} Stevens asserts the following sole assignment of error in his brief of May 21, 2009:

{¶ 9} “THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S MOTION FOR NEW TRIAL WITHOUT CONDUCTING A[N] EVIDENTIARY HEARING TO DETERMINE THE MERIT OF APPELLANT’S CLAIM, WHEN CREDIBLE EVIDENCE WERE (sic) PRESENTED TO SUPPORT THE GRANTING OF A NEW TRIAL, AND WHEN LEAVE TO FILE DELAYED MOTION FOR NEW TRIAL WAS INCORPORATED INTO SAID MOTION.”

{¶ 10} “‘Crim R. 33(A)(6) permits a convicted defendant to file a motion for a new trial upon grounds that new evidence material to the defense has been discovered that the defendant could not with reasonable diligence have discovered and produced at trial. However, such a motion must be filed within 120 days after the day of the verdict, unless the trial court finds by clear and convincing evidence that he was unavoidably prevented from discovering the evidence.’ *State v. Parker*, 178 Ohio App.3d 574, 576-577, 2008-Ohio-5178, ¶ 15. To seek a new trial based on new evidence more than 120 days after the verdict, a petitioner ‘must first file a motion for leave, showing by “clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.” ’

Id. at 577, quoting *State v. Morgan*, Shelby App. No. 17-05-26, 2006-Ohio-145. “ ‘[A] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion for 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.’ ” Id., quoting *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146.” *State v. Wilson*, Montgomery App. No. 23247, 2009-Ohio-7035, ¶ 8.

{¶ 11} “[T]he motion for new trial may not be considered until the court makes a finding of unavoidable delay. * * * If the defendant submits documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there was unavoidable delay.” (Citations omitted). *State v. York* (Feb. 18, 2000), Greene App. No. 99CA54.

{¶ 12} We agree with the trial court that Stevens failed to request the necessary leave to file his motion for a new trial. Further, as the trial court properly determined, the affidavits attached to Stevens’ motion on their face do not support his claim that he was unavoidably prevented from discovering the evidence contained therein; the trial court noted that the May 31, 2008 Pitts’ affidavit, in which Pitts, who was present at the scene shortly after the shooting, avers that he observed two men fleeing the scene, one of whom pointed a weapon at him, and neither of whom was Stevens, “is virtually identical to his affidavit dated April 21, 2003, which the Defendant previously produced in support of his Motion for Leave to File a Delayed Motion for New Trial. The Court already denied that Motion and the Court of Appeals dismissed his appeal.” We agree with the trial court that the “issues

in that appeal cannot be revisited here,” pursuant to the doctrine of res judicata. See *State v. Perry* (1967), 10 Ohio St.2d 175, syllabus at ¶ 9.

{¶ 13} The Stroud and Allen affidavits both state that the victim herein, James Brown, told the affiants that Keith De Witt shot him. Keith De Witt was identified as the shooter not only in the Harrell affidavit in 2003, but also in the affidavit of Theresa Jackson, which was attached to Stevens’ February 10, 1997 motion for a new trial, and Stevens cannot claim that the Stroud and Allen affidavits contain new evidence that was not known to him. The Abuhilwa affidavit merely corroborates the Pitts affidavit, which we have rejected.

{¶ 14} For the foregoing reasons, the assigned error in Stevens’ May 21, 2009 brief is overruled.

{¶ 15} Stevens asserts in his brief of July 27, 2009, “Assignment of Error No. One and Two Argued together,” as follows:

{¶ 16} “THE CONVICTION AND SENTENCES ON THE AGGRAVATED ROBBERY AND ROBBERY COUNTS SHOULD BE VACATED AND SET ASIDE AND THOSE COUNTS DISMISSED BECAUSE THE INDICTMENT FAILED TO CHARGE A CRIME, OMITTING AN ALLEGATION OF A CULPABLE MENTAL STATE, AND COURT OF COMMON PLEAS DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THOSE COUNTS.”

{¶ 17} First, *Colon I* is prospective in nature; since Stevens was convicted in 1996, *Colon I* has no application herein, as the trial court correctly determined. *Colon II*, 119 Ohio St.3d at 204. Further, as the trial court also noted, Stevens was not convicted of robbery.

{¶ 18} There being no merit to Stevens' assigned error(s), the judgments of the trial court are affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Connie S. Price