

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GERALD D. FIELDS

Defendant-Appellant

: JUDGES:

: Hon. Patricia A. Delaney, P.J.

: Hon. John W. Wise, J.

: Hon. Craig R. Baldwin, J.

: Case No. CT2024-0047

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County  
Court of Common Pleas, Case No.  
CR2019-0123

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

September 25, 2024

APPEARANCES:

For Plaintiff-Appellee:

JOSEPH A. PALMER  
MUSKINGUM CO. PROSECUTOR'S  
OFFICE  
27 North Fifth St.  
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For Defendant-Appellant:

GERALD D. FIELDS, PRO SE  
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*Delaney, P.J.*

{¶1} Appellant Gerald D. Fields appeals from the April 4, 2024 Entry of the Muskingum County Court of Common Pleas overruling his motion for a new trial. Appellee is the state of Ohio.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} The instant case has a protracted procedural history. The following summary addresses only what is directly relevant to the instant appeal.

{¶3} In 2019, appellant was charged by indictment with multiple counts of drug possession and trafficking. The matter proceeded to trial and appellant was found guilty upon one count of possession of cocaine, one count of possession of marijuana, one count of cocaine trafficking, one count of marijuana trafficking, and one count of illegal manufacture of drugs (cocaine). The jury further found, however, that appellant's residence and \$7,700 were not subject to forfeiture.

{¶4} Appellant directly appealed from his convictions and sentence; we affirmed. *State v. Fields*, 5th Dist. Muskingum No. CT2019-0073, 2020-Ohio-3995, appeal not allowed, 160 Ohio St.3d 1507, 2020-Ohio-6835, 159 N.E.3d 1152. Appellant continues to appeal and seek post-conviction relief from the underlying criminal convictions and sentence.

{¶5} Appellant also initiated several avenues of relief in attempts to regain the seized property from appellee, including petitions for a writ of mandamus and an action in replevin, all of which also resulted in numerous appeals before this Court.

{¶6} Relevant to the instant appeal, on October 12, 2023, the State of Ohio filed an Application for Release and Distribution of Abandoned Funds, and appellant filed a written objection.

{¶7} By Judgment Entry filed November 14, 2023, the trial court granted the Application, finding the \$7,700.00 in U.S. Currency was abandoned and ordered that said funds shall be released and distributed in equal shares to the Muskingum County Prosecutor's Office and the Zanesville Police Department.

{¶8} Appellant appealed from the trial court's decision in *State v. Fields*, 5th Dist. Muskingum No. CT2023-0094, 2024-Ohio-1426. We found the trial court had subject-matter jurisdiction over the criminal case and appellant lacked standing to challenge the trial court's order. *Id.*, ¶ 43. We noted "both this Court and the Muskingum County Common Pleas Court have determined that the \$7,700 at issue in this case did not belong to Appellant." *Id.*, ¶ 44, citing *Fields v. Zanesville Police Dept.*, 5th Dist. Muskingum No. CT2023-0021, 2023-Ohio-2988. We cited Misty Roe's testimony at the criminal trial and the fact that Roe testified that the money was jointly hers and appellant's, but "the record before this Court shows that she did not waver in her testimony that the money was derived solely from her checks and her tax return." *State v. Fields*, 5th Dist. Muskingum No. CT2023-0094, *supra*, 2024-Ohio-1426, ¶ 6.

{¶9} We note that in the application, appellee mentioned Roe's testimony but did not rely upon it. Instead, appellee relied upon our decision in *Fields v. Zanesville Police Dept.*, 5th Dist. Muskingum No. CT2023-0021, 2023-Ohio-2988, *supra*, in which we found appellant failed to prove he was the rightful owner of the funds, and appellant failed to file

a replevin action within the statutory time limit of two years from the jury's decision declining forfeiture. R.C. 2744.04(A).

{¶10} Relevant to the instant appeal, on February 15, 2024, appellant filed a motion for new trial in his criminal case, utilizing elements from appellee's Application for Release and Distribution of Abandoned Funds because appellee cited Roe's testimony the \$7700 in cash seized by law enforcement was inside a pillowcase in a bedroom she shared with Tara Harris. By the same logic, appellant argues, the "white substance on the bedrail" in that same bedroom, which led to his conviction for manufacturing cocaine, also was not his. Therefore, he asserts, there were "irregularities" at his criminal jury trial requiring leave to file a motion for new trial.

{¶11} Appellee responded to the motion for new trial with a memorandum in opposition.

{¶12} The trial court overruled the motion for leave by Entry dated April 4, 2024.

*Appellee's motion to dismiss appeal is overruled*

{¶13} The docket indicates appellant filed a notice of appeal from the trial court's Entry on April 19, 2024. Appellee argues no notice of appeal was filed and appellant initiated an untimely appeal on May 20, 2024; appellee therefore filed a motion to dismiss the appeal. Appellant's Notice of Appeal states it was served upon appellee by regular mail on April 15, 2024. Appellee's motion to dismiss is not well-taken and is overruled.

{¶14} Appellant raises one assignment of error:

**ASSIGNMENT OF ERROR**

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED GERALD D. FIELDS' REQUEST FOR A NEW TRIAL THEREBY IGNORING PROOF OF

IRREGULARITIES WITHIN THE PROCEEDINGS, MISCONDUCT ON THE PART OF WITNESSES FOR THE STATE, AND PROVING HE WAS NOT IN POSSESSION OF THE SUBSTANCE THAT LED TO THE F2 MANUFACTURING CHARGE BECAUSE IT WAS LOCATED IN ANOTHER PERSON'S ROOM. SUCH ACTIONS DEPRIVED GERALD D. FIELDS OF HIS FUNDAMENTAL RIGHTS TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.”

### **ANALYSIS**

{¶16} In his sole assignment of error, appellant argues the trial court should have granted his motion for new trial in his criminal proceeding. We disagree.

{¶17} Appellant's motion for new trial conflated two potential grounds for granting a new trial: procedural irregularity and newly-discovered evidence. Crim.R. 33(A)(1) allows a trial court to grant a new trial, on a defendant's motion, when “irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court” materially affected the defendant's substantial rights and prevented them from having a fair trial. Separately, Crim.R. 33(A)(6) allows a new trial where “new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial” and the defendant's substantial rights were materially affected.

{¶18} Appellant's intermingled argument can be summarized as follows: (1) it was procedurally irregular for appellee to make what appellant perceives as inconsistent arguments as to who owned or had control over items in the bedroom; (2) while appellant has been aware of the testimony and appellee's arguments, he only recently concluded that this was procedurally irregular and justifies a new trial, and (3) because appellant

only recently discovered the purported legal effect of the irregularity, his motion presents newly-discovered evidence and he was unavoidably prevented from making his motion sooner.

{¶19} While appellant invokes the language of Crim.R. 33(A)(6) by referring to “newly discovered evidence,” he presents no new evidence. The legal effect, if any, of appellee’s arguments regarding Roe’s testimony in various proceedings is irrelevant; it has nothing to do with appellant’s factual guilt or innocence of the offenses with which he was charged. Evid.R. 401 (“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

{¶20} Thus, appellant’s motion is properly construed as one made only under Crim.R. 33(A)(1). *State v. Ali*, 8th Dist. Cuyahoga No. 112285, 2023-Ohio-2587, ¶ 13.

{¶21} A defendant relying upon a claimed procedural irregularity generally must make a motion under Crim.R. 33(A)(1) within 14 days after the jury enters its verdict. See Crim.R. 33(B). Where, as here, a defendant misses that window — a delay of five years in the instant case — the defendant must obtain leave from the trial court to file it. *Ali*, supra, 2023-Ohio-2587, ¶ 14. To obtain leave, a defendant must show “by clear and convincing proof” that they were “unavoidably prevented” from filing a timely motion. See *id.* Ordinarily, this means that a defendant must show that they “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.” *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360,

[Cite as *State v. Fields*, 2024-Ohio-4692.]

¶ 11; see also *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 21.

{¶22} “Clear and convincing evidence” is that “measure or degree of proof” that “produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. “It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *Id.* at 477 (emphasis deleted).

{¶23} The Ohio Supreme Court recently instructed as follows:

When a defendant seeks leave to file a motion for a new trial under Crim.R. 33(B), the trial court may not consider the merits of the proposed motion for a new trial until after it grants the motion for leave. The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial. (Citations omitted.)

*State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, ¶ 30.

{¶24} The decision whether to grant a motion for leave to file a motion for a new trial is committed to the trial court's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. See, *Hatton* supra at ¶ 29. A trial court also has discretion to decide whether to hold a hearing on this kind of motion. See, e.g., *State v.*

[Cite as *State v. Fields*, 2024-Ohio-4692.]

*Cannon*, 8th Dist. Cuyahoga No. 103298, 2016-Ohio-3173, ¶ 16. A hearing is only required when “the documents submitted [with the motion] on their face support the defendant's claim that he was unavoidably prevented from timely discovering” the grounds for the motion. *See, e.g., State v. Cowan*, 8th Dist. Cuyahoga No. 108394, 2020-Ohio-666, ¶ 11.

{¶25} “Abuse of discretion” means an attitude that is unreasonable, arbitrary or unconscionable. *State v. Owens*, 5th Dist. Delaware No. 23 CAA 09 0088, 2024-Ohio-3383, ¶ 8, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985). Most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. *Id.*, citing *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). An unreasonable decision is one backed by no sound reasoning process which would support that decision. *Id.* “It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *Id.*

{¶26} With these standards and instructions in mind, after careful consideration, we conclude the trial court exercised its discretion appropriately when it denied appellant’s motion for leave without a hearing. Appellant argues that Roe’s testimony constitutes an irregularity in the proceedings because appellee used the testimony in the replevin case to establish the items in the bedroom didn’t belong to him, when at his criminal trial, appellee argued the drugs in the same bedroom did belong to him. This is not a procedural irregularity arising from appellant’s jury trial. Roe’s statements regarding



the cash in the pillow is irrelevant to the evidence establishing appellant's guilt or innocence of the illegal manufacture offense.

{¶27} Moreover, appellant's motion for leave is untimely. The verdict in appellant's criminal case was rendered on or around June 4, 2019, but appellant's motion for leave to file a motion for new trial was not filed until February 15, 2024. We note that the testimony of Misty Roe which appellant deems pivotal occurred during his criminal trial; that conviction and sentence were affirmed upon direct appeal, and are final. Appellant does not and cannot contend that any of this information is newly-discovered; it is simply his latest argument developed from long-established testimony.

{¶28} Appellant does not contend he was unavoidably prevented from discovering the alleged "irregularities" in appellee's case because he wasn't. Appellant's proof must be more than conclusory allegations. "Clear and convincing proof that the defendant was 'unavoidably prevented' from filing 'requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial.'" *State v. Lee*, 10th Dist. Franklin No. 05AP-229, 2005-Ohio-6374, 2005 WL 3220245, ¶ 9. 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. Rodriguez—Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11. Clear and convincing proof is that "which will produce in the mind of the trier of facts a firm belief of conviction as to the facts sought to be established." *Schniebel*, 55 Ohio St.3d at 74.

{¶29} Appellant's argument does not establish a sufficient basis for us to find the trial court abused its discretion in overruling the motion for leave to file a motion for new

[Cite as *State v. Fields*, 2024-Ohio-4692.]

trial. His motion before the trial court, and his arguments on appeal, merely rehash the evidence from his criminal trial and do not rise to the level of an “irregularity” requiring a new trial.

{¶30} Because appellant raises no colorable excuse for failing to file a timely Crim.R. 33(A)(1) motion based on the argument he now raises, he was not entitled to leave to file the new-trial motion. Therefore, the trial court appropriately denied the motion.

### **CONCLUSION**

{¶31} Appellant’s sole assignment of error is overruled and the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, J. and

Baldwin, J., concur.