[Cite as *State v. Cottrell*, 2024-Ohio-4900.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113453
v.	:	
STEVE COTTRELL,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-01-409361-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Chauncey Keller, Assistant Prosecuting Attorney, *for appellee.*

Michael A. Partlow, *for appellant*.

KATHLEEN ANN KEOUGH, A.J.:

{¶ 1} Defendant-appellant, Steve Cottrell ("Cottrell"), appeals from the trial court's denial of his motion for leave to file a motion for new trial under Crim.R. 33. For the following reasons, we affirm.

Factual and Procedural History

{¶ 2} Cottrell's appeal stems from defense counsel's alleged failure to advise Cottrell of a plea offer presented at a hearing outside Cottrell's presence. The assistant prosecuting attorney allegedly made the new plea offer on March 18, 2002, during the following verbal exchange between the trial court, the assistant prosecuting attorney, and defense counsel:

> The Court: . . . Now before we go any further have there been any plea negotiations, real quick. What have you offered him?
>
> Assistant Prosecuting Attorney: I offered him if he rolls over on Marcus McCall my supervisor, Tom Sammon, has indicated to me he would go down to murder, but the defense has indicated they can't take a life tail. I came back and cut it to if he'll take 23 years on a manslaughter and attempted murder and they said they don't think so.
>
> The Court: Have you conveyed this to them?
>
> Assistant Prosecuting Attorney: But that's not an offer.
>
> Defense Counsel: We've just had this conveyed to him.
>
> The Court: But is he up here?
>
> Assistant Prosecuting Attorney: See, the problem is that's not an offer. Right now my mark is murder with a gun spec if he cooperates.
>
> The Court: Which is what, how many years to life?
>
> Assistant Prosecuting Attorney: Fifteen to life plus three on the gun, that's 18 years to life.
>
> Defense Counsel: And they'll always flop, flop, flop on a life tail because they have to keep their jobs and that's the board of parole.
>
> The Court: But if he's convicted what's he facing?
>
> Defense Counsel: Twenty-three to life, your Honor.

> The Court: That's all. Well, now if he's convicted he could face 23 to life on the aggravated murder, ten on the attempted murder, so he's facing 33 to life, I guess, plus there is the other attempted murder.
>
> Defense Counsel: The state would have to prove a separate animus toward the individual named defendants.
>
> Assistant Prosecuting Attorney: I don't have to prove a same animus as to Jermelle Thomas.
>
> The Court: Would you nolle the other case?
>
> Assistant Prosecuting Attorney: I think that would be doable, yeah.
>
> The Court: So we're talking 18 to life — hold on a minute, 18 to life, that includes the gun, right?
>
> Assistant Prosecuting Attorney: Yeah.
>
> The Court: That includes the gun and you'll nolle the other one, the 409361?
>
> Assistant Prosecutor: Judge, none of this is —
>
> The Court: I'm just saying —
>
> Assistant Prosecuting Attorney: Yes, I think the other one going out would be probably would be — that wouldn't be a problem.
>
> The Court: Okay. Is he still up.
>
> Defense Counsel: They took him down, I think.
>
> The Court: Let's give him something to think about. Why don't you go in and talk to him.

Tr. 158-161. The record does not reflect any subsequent discussion about the alleged new plea offer.

{¶ 3} Following the March 18, 2002 hearing during which the above conversation occurred, the case proceeded to a jury trial, and the jury found Cottrell guilty of one count of aggravated murder, three counts of attempted murder, and firearm and criminal gang activity specifications. On April 26, 2002, the trial court sentenced Cottrell to 20 years to life on aggravated murder; three years for the firearm specification and three years for the criminal gang activity specification, to be served consecutively to each other; five years for one count of attempted murder to be served consecutive to the aggravated murder charge; and five years each on the remaining attempted murder charges to run concurrently to the other sentences.[1]

{¶ 4} On May 8, 2002, Cottrell filed a direct appeal arguing nine assignments of error including ineffective assistance of counsel, and this court affirmed Cottrell's convictions and sentence. *See Cottrell I*. Cottrell filed a second appeal in *State v. Cottrell*, 2012-Ohio-2634 (8th Dist.), where this court found (1) Cottrell's argument that his judgment of conviction was not a final, appealable order was precluded by the doctrine of res judicata and (2) the trial court did not properly impose the mandatory terms of postrelease control for Cottrell's convictions. This court remanded the matter for a limited resentencing on the issue of postrelease control, and on remand the trial court resentenced Cottrell. Cottrell filed a third appeal, on November 5, 2012, arguing the trial court erred when it denied him a de

[1] For a thorough recitation of the facts in this case, *see State v. Cottrell*, 2003-Ohio-5806, ¶ 3-16 (8th Dist.) ("*Cottrell I*").

novo resentencing on all counts, and this court affirmed the trial court's limited resentencing. *See State v. Cottrell*, 2013-Ohio-2912 (8th Dist.).

{¶ 5} Cottrell filed numerous postconviction motions with the trial court from September 23, 2013, through December 29, 2016. Approximately seven years later and over 20 years after his conviction, on November 1, 2023, Cottrell filed a motion for leave to file a motion for new trial ("motion for leave") with the trial court arguing (1) the failure of defense counsel to relay the March 18, 2002 plea offer constituted an irregularity in the proceedings that prevented him from having a fair trial and (2) he was unavoidably prevented from discovering the existence of the plea offer until he received a report from his private investigator in late 2020.

{¶ 6} Cottrell attached an affidavit to his motion for leave that reads, verbatim:

> 1. I am an individual of sound mind and body being at least eighteen years of age and make the following statements based upon my personal knowledge of such.
>
> 2. I have executed this affidavit of my own free will and accord without any threats and or promises being made to me in consideration of the same.
>
> 3. Prior to my trial, I had indicated to my trial counsel that I would not accept any plea deal which involved a potential life sentence.
>
> 4. Prior to my trial, I was aware of problems with my case in dealing with eyewitness testimony etc.
>
> 5. I did attend a hearing on or about March 18, 2002 wherein a variety of pre-trial matters were addressed. While I was at the hearing, no new plea offers were presented.

> 6. Years later, I retained the firm of Robinson & Brandt, P.S.C. to investigate the case and in late 2020 they reported that after I had left the hearing in March of 2002, the State made a plea offer to plead guilty to manslaughter and attempted murder for which I would receive a definite term of 23 years incarceration.
>
> 7. Although my trial counsel was advised to communicate this new plea offer to me by the trial judge, I was never advised of such.
>
> 8. In light of the problems and circumstances involved in my case, I would have accepted the 23 year plea offer had such been communicated to me.

Cottrell's August 25, 2023 affidavit.

{¶ 7} On November 14, 2023, the trial court issued a detailed judgment entry denying Cottrell's motion for leave that reads, in pertinent part:

> "A criminal defendant is only entitled to a hearing on a motion for leave to file a motion for a new trial if he or she submits documents which, on their face, support his or her claim that he or she was unavoidably prevented from timely discovering the evidence at issue." *State v. Dues*, 8th Dist. No. 105388, 2017-Ohio-6983, ¶ 12, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1811, 869 N.E.2d 77 (2d Dist.). ""Mere conclusory allegations do not prove that the defendant was unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial." *State v. Cashin*, 10th Dist. No. 17AP-338, 2017-Ohio-9289, ¶ 17; *see also State v. Miller*, 8th Dist. No. 110571, 2022-Ohio-378, ¶ 14(same.)" *State v. McFarland*, 8th Dist. No. 111390, 2022-Ohio-4638, ¶ 28.
>
> The "newly discovered" irregularity stems from proceedings conducted prior to commencement of the trial. It appears that the proceedings were a matter of record although Defendant failed to present the transcript of the proceedings or any other evidence related to the proceedings. Defendant presented only conclusory allegations that he was unavoidabl[y] prevented from discovering the purported new evidence.
>
> For the foregoing reasons, the Court finds that Defendant failed to submit documents which, on their face, support his claim that he was

> unavoidably prevented from timely discovering the evidence at issue so no hearing is necessary on this matter and his motion is DENIED.
>
> IT IS SO ORDERED.

November 14, 2023 judgment entry.

{¶ 8} On December 11, 2023, Cottrell filed his fourth and current notice of appeal presenting a single assignment of error: The trial court erred by denying appellant's motion for leave to file a motion for a new trial.

Legal Analysis

{¶ 9} Cottrell contends the trial court abused its discretion by denying his motion for leave to file a motion for new trial pursuant to Crim.R. 33(A)(1).

{¶ 10} Crim.R. 33(A) sets forth the grounds on which a trial court may grant a defendant's motion for a new trial in a criminal case. Cottrell alleged he was entitled to a new trial pursuant to Crim.R. 33(A)(1), which reads:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:
>
> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial.

{¶ 11} Following a jury trial — as in the instant case — a defendant must file a Crim.R. 33(A)(1) motion within 14 days of the jury's verdict. Crim.R. 33(B). Where a defendant does not file a motion for new trial within that timeframe — Cottrell filed his motion over 20 years after he was convicted and sentenced — the defendant must first obtain leave from the trial court to file the motion.

{¶ 12} To obtain leave to file a motion for new trial, the defendant must establish by "clear and convincing proof that the defendant was unavoidably prevented from filing his motion for new trial . . . within the time provided." Crim.R. 33(B); *see State v. Bridges*, 2016-Ohio-7298, ¶ 18 (8th Dist.), citing *State v. Hoover-Moore*, 2015-Ohio-4863, ¶ 13 (10th Dist.).

{¶ 13} "Clear and convincing evidence is that measure or degree of proof . . . which will produce 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 (1954), paragraph three of the syllabus.

{¶ 14} """[A] party is unavoidably prevented from filing a motion for 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.""" *State v. McFarland*, 2022-Ohio-4638, ¶ 16 (8th Dist.), quoting *State v. Apanovitch*, 2020-Ohio-4217, ¶ 15 (8th Dist.), quoting *State v. Walden*, 19 Ohio App.3d 141 (10th Dist. 1984).

{¶ 15} Further,

> [w]hen 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. *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 41, citing *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 14. 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.

State v. Hatton, 2022-Ohio-3991, ¶ 30.

{¶ 16} In addition to ruling on the motion for leave, the trial court also has discretion to determine whether a hearing on that motion is necessary. *State v. Ali*, 2023-Ohio-2587, ¶ 17 (8th Dist.). "A criminal defendant is only entitled to a hearing on a motion for leave to file a motion for a new trial if he or she submits documents which, on their face, support his or her claim that he or she was unavoidably prevented from timely discovering the evidence at issue." *State v. Dues*, 2017-Ohio-6983, ¶ 12 (8th Dist.), citing *State v. McConnell*, 2007-Ohio-1181, ¶ 7 (2d Dist.).

{¶ 17} This court reviews a trial court's decision to grant or deny a Crim.R. 33 motion for leave under an abuse-of-discretion standard. *State v. Washington*, 2016-Ohio-5329, ¶ 15 (8th Dist.), citing *State v. Pinkerman*, 88 Ohio App.3d 158, 160, (4th Dist. 1993). The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983); *Johnson v. Abdullah*, 2022-Ohio-3991, ¶ 35.

{¶ 18} With these standards in mind, and after careful consideration, we conclude that the trial court did not abuse its discretion when it denied Cottrell's motion. Cottrell asserts in his motion for leave that he was unaware of the alleged plea offer until 2020. However, our review shows the alleged plea offer was contained in the trial transcript that has been part of the appellate record since

Cottrell's direct appeal in 2002. "Evidence is not undiscoverable simply because no one looked for it." *State v. Smith*, 2024-Ohio-1360, ¶ 78 (8th Dist.).

{¶ 19} Further, Cottrell offered only his self-serving affidavit and did not present the transcript of the proceedings or any other evidence in support of his allegations. "The burden to demonstrate clear and convincing proof of unavoidable delay requires something more than bare allegations or statements in a motion." *State v. Moore*, 2018-Ohio-318, ¶ 21 (2d Dist.). Cottrell's affidavit, which simply states he was unaware of the alleged plea offer until he received a private investigator's report in 2020, was insufficient to meet this burden.

{¶ 20} Also, because Cottrell could have raised this issue on his direct appeal, but chose not to do so, the claim is barred by res judicata. "'Res judicata generally bars a convicted defendant from litigating a postconviction claim that was raised or could have been raised at trial or on direct appeal.'" *State v. Ali*, 2023-Ohio-2587, ¶ 21 (8th Dist.), quoting *State v. Bethel*, 2022-Ohio-783, ¶ 17. The doctrine of res judicata applies in the context of motions for a new trial. *State v. Hatton*, 2022-Ohio-3991, ¶ 22.

{¶ 21} Cottrell also argues on appeal that the trial court erred when it denied his motion for leave without a hearing. However, where the affidavit submitted with Cottrell's motion for leave was insufficient to establish he was unavoidably prevented from filing a timely motion, we conclude the trial court acted within its discretion when it decided not to hold a hearing on the motion.

{¶ 22} We note that Cottrell's reliance on *Bethel* is misguided. "In *Bethel*, the Supreme Court implicitly overruled previous appellate cases that had required that a motion for leave to file a delayed motion for new trial be filed 'within a reasonable time after the discovery of the new evidence,' finding that no such timing requirement exists in Crim.R. 33(B)." *State v. Sevilla*, 2023-Ohio-1726, ¶ 18 (10th Dist.), citing *Bethel* at ¶ 58. No similar finding was made in this matter where Cottrell's motion for leave claimed an irregularity in proceedings rather than the discovery of new evidence. Further, Cottrell needed to introduce more than his self-serving affidavit to satisfy the unavoidably prevented standard and demonstrate that he did not know of the alleged plea offer within the time prescribed for filing a new trial motion.

{¶ 23} Thus, we overrule Cottrell's sole assignment of error.

{¶ 24} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

____
KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MICHAEL JOHN RYAN, J., and
ANITA LASTER MAYS, J., CONCUR