[Cite as *State v. Glover*, 2010-Ohio-4112.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93623

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAURESE GLOVER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-324431

BEFORE: Kilbane, P.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Laurese Glover (Glover), appeals the trial court's denial of his motion for new trial. He argues that newly discovered forensic testing warrants a new trial in this matter.

{¶ 2} On June 13, 1995, Glover and codefendants Derrick Wheat (Wheat) and Eugene Johnson (Johnson) were indicted for aggravated murder with firearm specifications for the drive-by shooting of Clifton Hudson. A jury trial commenced on January 8, 1996. All three codefendants were tried together. After the prosecution rested, the defense made a Crim.R. 29 motion. The trial court found insufficient evidence to establish prior calculation and design, and the charge of aggravated murder was dismissed with respect to all three codefendants. The trial court found sufficient evidence to proceed on the murder charge.

{¶ 3} On January 18, 1996, Glover was convicted of murder, but found not guilty of the accompanying firearm specifications.

{¶ 4} Glover was sentenced on January 22, 1996, to a term of 15 years to life for the murder. Glover's conviction was affirmed by this court in *State v. Glover* (Jan. 16, 1997), 8th Dist. No. 70215.

{¶ 5} On March 4, 2009, Glover filed the instant motion for new trial based on newly discovered evidence.

{¶ 6} On March 30, 2009, the State filed a consolidated brief in opposition to Glover's motion and to an identical, but separately filed, motion

by Wheat. Codefendant Johnson filed a separate motion addressing substantially similar issues as well.

{¶ 7} On April 16, 2009, the trial court held a joint hearing on the motions for new trial filed by Glover, Wheat, and Johnson.

{¶ 8} On June 23, 2009, the trial court denied the motions without any findings or opinion.

{¶ 9} This appeal followed. Glover's sole assignment of error states:

> **"The trial court abused its discretion in denying Glover's motion for a new trial based on newly discovered evidence pursuant to Ohio Criminal Rule 33(A)(6)."**

Standard of Review

{¶ 10} A motion for a new trial is addressed to the sound discretion of the trial court and will be granted or refused as the justice of the case requires. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. We will not reverse a lower court's refusal to grant a new trial unless there has been an abuse of that discretion and unless it appears that the matter asserted as a ground for a new trial materially affects the substantial rights of the defendant. Crim.R. 33; *Sabo v. State* (1928), 119 Ohio St. 231, 163 N.E. 28; *Long v. State* (1923), 109 Ohio St. 77, 141 N.E. 691. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} In addition, Crim.R. 33(A)(6) states:

> **"A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:**
>
> *** * ***
>
> **(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."**

Glover's Arguments

{¶ 12} Although he was found not guilty of the firearm specifications accompanying his murder charge, Glover challenges the scientific accuracy of the gunshot residue testing performed by the Cuyahoga County Coroner on behalf of the State. The type of test employed at the time of trial is known as Atomic Absorption Spectroscopy, or AAS testing. Before trial, Glover's vehicle was tested for the presence of lead residue and nitrites. The presence of lead was detected on the bottom of the front passenger's seat, the armrest on the passenger's side door, and on the exterior of the passenger's side door below the window. The residue found on the door was consistent with the

same lead residue that is present when a firearm is discharged. Glover argues that the forensic evidence linking him to the crime is not conclusive in light of more recent scientific advancements in this field known as Scanning Electron Microscopy/Energy Dispersive X-ray Spectroscopy (SEM/EDS). As a result, Glover concludes that the State's expert, Sharon Rosenberg (Rosenberg), would no longer be able to testify to a reasonable degree of scientific certainty that the elements she tested under the AAS test are consistent with gunshot residue.

{¶ 13} Glover argues that this newly discovered SEM/EDS test demonstrates that the methodology underlying the opinion that there was gunshot residue on Glover's codefendant, Derrick Wheat, and on the passenger's side door of the automobile Glover was driving, is scientifically unreliable. In support of this, Glover relies on the results of a Federal Bureau of Investigation symposium from the spring of 2005 that sought to unify "the criteria necessary for reporting a positive GSR [gunshot residue] result." (See appellant's exhibit E.) Glover also relies on the testimony and reports of Jon Nordby, Ph.D. (Dr. Nordby), whose opinion to a reasonable degree of scientific certainty is that the AAS testing method utilized by the county coroner's office at the time of trial is no longer a scientifically accepted method for indicating the presence of gunshot residue.

{¶ 14} AAS testing provides elemental composition results for gunshot residue, but is subject to false positive test results since it only tests for the presence of gunshot residue particles lead, barium, and antimony. Glover argues that the mere presence of these elements no longer indicates a positive gunshot residue test result in light of the scientific advancements that led to SEM/EDS testing, which conducts a "morphological" analysis – that is, a test for whether lead, barium, and antimony particles are fused or bonded together; not whether these elements are merely present at some level as under AAS.

{¶ 15} In his brief, Glover points out that since the time he was tried, the Cuyahoga County Coroner has abandoned AAS testing in favor of SEM/EDS testing. In fact, the most recent Cuyahoga County Coroner's Standard Operating Procedure now requires "the confirmation of at least one lead-barium-antimony particle exhibiting characteristic Gunshot morphology"; not just the presence of these items, as under the former AAS test. (See appellant's exhibit A.)

{¶ 16} Glover also argues that contact with automotive friction products, such as brake pads, could produce a false positive test for gunshot residue, as could secondary contamination from being in a police environment. In light of the scientific advancement of SEM/EDS testing, the potential for a "false positive" test by contact with material such as brake pads, and the potential

for secondary contamination in a police environment, Glover argues that he is entitled to a new trial.

{¶ 17} We disagree. None of the forensic evidence from the AAS test implicated Glover as the shooter at trial. The jury recognized this by finding him not guilty of the firearm specifications in his indictment. Clearly, the jury viewed Glover's actions in conjunction with the other competent, credible evidence in the case, including additional eyewitness testimony, and his own admission that he was at the scene, driving the vehicle that was implicated in the shooting. In light of this, we cannot say that employing a new test to the gunshot residue evidence would somehow result in a different outcome for Glover if we were to order a new trial.

The State's Arguments

{¶ 18} The State argues that Glover is not entitled to a new trial since the positive AAS test was but one piece of evidence that the jury relied on in convicting him. The State argues that additional eyewitness evidence linked Glover to the crime. Further, Glover's expert, Dr. Nordby, testified at the motion hearing that he could have conducted these tests as far back as 1995, so his motion is not timely, and SEM/EDS testing does not constitute "newly discovered evidence" under Crim.R. 33(A)(6).

{¶ 19} On this point, the State cites Glover's repeated references to a report and testimony from a previous hearing by a different forensic expert,

John Kilty (Kilty),[1] which Glover's expert, Dr. Nordby, partially relied on in making his own findings. The State argues that since Kilty's report and testimony contain findings from before 1995, and Dr. Nordby admitted that some of the science surrounding SEM/EDS testing predates 1995, Glover could have, through the exercise of reasonable diligence, discovered this testing sooner. According to the State, Glover could have asked for a new trial in a timely manner under the 120-day window contemplated by Crim.R. 33, if he would have only exercised reasonable diligence in obtaining this material, since Kilty's conclusions and testimony are not "newly discovered evidence." The State argues that even under the most generous calculation, Glover has far exceeded the 120-day deadline under the rule for presenting newly discovered evidence.

Whether Glover Has Unduly Delayed in Filing His Motion

{¶ 20} As stated above, Crim.R. 33(A)(6) sets forth the guidelines for filing a motion for a new trial based on newly discovered evidence. *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183. In discussing

[1]John W. Kilty is a forensic science consultant and former F.B.I. Agent and Chief of the Gunshot Residue and Metals Analysis Unit. Before the joint hearing on the motions for new trial, the parties stipulated that Kilty's testimony from a federal habeas corpus action, *Johnson v. Gansheimer* (Sept. 21, 2009), N.D. Ohio No. 06 CV 2816, and a report he prepared at Dr. Nordby's request, were part of the record in these cases, but were not newly discovered evidence.

that rule, this court has stated that, "'[i]n order to be able to file a motion for a new trial based on newly discovered evidence beyond the one hundred and twenty days prescribed in the above rule, 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.'" *State v. Gray*, 8th Dist. No. 92646, 2010-Ohio-11. (Internal citations omitted.)

{¶ 21} In examining the record to determine whether Glover has presented sufficient evidence to satisfy the "clear and convincing evidence" standard, we will not substitute our judgment for that of the trial court if competent, credible evidence supports the trial court's decision. Id. at ¶16. Here, we find that competent, credible evidence exists to support the trial court's decision granting Glover's motion for leave to file motion for new trial.

{¶ 22} Contrary to the State's argument, Glover has not delayed unreasonably in presenting his motion. At the hearing on Glover's motion for new trial, Dr. Nordby indicated that, although he agreed with Kilty's findings generally, he did not agree with some of the pre-1995 science relied upon by Kilty in making his conclusions. Indeed, Dr. Nordby did not reach his current conclusions until 2007. Glover argues that the State confuses the techniques used by Kilty with the subsequent analysis conducted by other scientists who refined these techniques, including conducting a morphological analysis of the bonding of requisite lead-barium-antimony particles in the amount necessary

to definitively determine the presence of gunshot residue. The State ignores Dr. Nordby's testimony that SEM/EDS testing did not become scientifically accepted as the best method for testing gunshot residue until much later.

{¶ 23} In fact, the Cuyahoga County Coroner's Office Manual on Gunshot Primer Residue Analysis, effective March 12, 2007, provided the first instructions on conducting SEM/EDS testing in Cuyahoga County. Glover did not receive Dr. Nordby's final report until November 13, 2008. Glover's motion was filed a mere two months later, on January 16, 2009. The trial court did not abuse its discretion in granting Glover's motion for leave to file motion for new trial.

Whether Glover is Entitled to a New Trial

{¶ 24} In order to prevail on a motion for new trial based upon newly discovered evidence, Glover must show that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370.

{¶ 25} When applying the factors as outlined in *Petro,* we believe that there is not a strong, or even reasonable, probability that the result of the trial

would change if a new trial is granted. With respect to the first factor, we note that SEM/EDS testing is not even newly discovered evidence per se, but a more recently accepted testing method. There is therefore no newly discovered evidence in this trial, but merely a new testing method. It is true that no morphological analysis of the gunshot residue was performed in this case, since SEM/EDS testing is a scientific advancement that the Cuyahoga County Coroner's Office did not apply at the time of trial. However, the conclusion that this new testing procedure presents a strong, or even reasonable, probability that the result of the trial would change depends on the outcome of the SEM/EDS test on the materials at issue in this case and the testimony of both parties with respect to its reliability.

{¶ 26} Both the State and Glover concede that there is no evidence left to test in this case, since the nitric acid used in the AAS test makes further testing of the physical evidence impossible. (Tr. 541.) Glover therefore asks this court to remand his case for retrial to employ new testing procedures, knowing full well that the evidence to be tested does not exist and that he was found not guilty of the gun specifications in his indictment. In his briefs and in argument, he cannot point to any cases in this jurisdiction or any other jurisdiction in the country granting a new trial based on evidence that AAS testing has given a false positive result for the presence of gunshot residue. We decline to do so now.

{¶ 27} As noted earlier, the State's testing at trial coincided directly with eyewitness testimony that two black males were in the front of Glover's black Chevrolet Blazer and that a shooter came from around the back of the vehicle to fire the fatal shots at Hudson. (Tr. 894.) Glover has always admitted to being present at the scene of the shooting, and to driving the black Chevrolet Blazer that was seen driving away from the scene. His position as the driver of the car explains why no residue was found on him since the gun was fired from the passenger's side of the car. This comports fully with the jury's finding of not guilty of the firearm specifications as to Glover.

{¶ 28} The jury had the opportunity to view all of the evidence as it applied to Glover, Wheat, and Johnson, respectively, and expressly found Glover not guilty of the firearm specification in his indictment. Retesting the gunshot residue evidence in this case would not change the outcome of Glover's trial.

{¶ 29} We further note that there is nothing about the manner in which the AAS test was conducted in this case that would lead this court to believe that the test is junk science as Glover argues. AAS testing is not faulty simply because it does not use an electron microscope to view the presence of fused particles. It has been superceded not because it was inherently inaccurate or faulty, but because the methods by which the SEM/EDS test is conducted are even more accurate.

{¶ 30} Lastly, while Glover argues in his statement of facts that the eyewitness testimony that helped convict him is faulty, he does not raise it as an issue in his brief. We therefore decline to address this argument, noting that this court decided the eyewitness identification and recantation issues intimated by Glover in his direct appeal when it stated: "We do not see the conviction of the appellant as being grounded in [the eyewitness] identification of the co-defendant, Johnson." *State v. Glover*, 8th Dist. No. 70215. This court also addressed this identical issue when it reversed the trial court's grant of new trial with respect to codefendant Eugene Johnson in *State v. Johnson*, 8th Dist. No. 85416, 2005-Ohio-3724.

{¶ 31} Accordingly, we simply cannot say that there is a strong likelihood that retrial with SEM/EDS testing procedures would produce a different result in this case, since SEM/EDS testing cannot be used on the evidence and because no evidence has been produced to challenge the validity of the AAS testing in this case. Glover's motion therefore fails the first factor of *Petro*.

{¶ 32} Accordingly, Glover's sole assignment of error is overruled. We find that the trial court did not abuse its discretion in denying Glover's motion for new trial.

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. The defendant's appeal having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY;
JAMES J. SWEENEY, J., CONCURS