[Cite as *State v. Wheat*, 2010-Ohio-4120.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93671

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DERRICK WHEAT

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, Derrick Wheat (Wheat),[1] appeals the trial court's denial of his motion for new trial. He argues that newly discovered forensic evidence warrants a new trial in this matter.

{¶ 2} On June 13, 1995, Wheat and two codefendants, Laurese Glover (Glover) and Eugene Johnson (Johnson), were indicted for aggravated murder with firearm specifications for killing Clifton Hudson, Jr., in a drive-by shooting on February 15, 1995.

{¶ 3} A jury trial commenced on January 8, 1996, and on January 18, 1996, Wheat was convicted of murder in violation of R.C. 2903.02 with firearm specifications, along with his codefendant Johnson. While Glover was convicted of murder as well, Glover was found not guilty of the accompanying firearm specifications.

{¶ 4} On January 18, 1996, Wheat was sentenced to a term of 15 years to life for the murder, plus three years consecutive for the firearm specifications. This conviction was affirmed in *State v. Wheatt* (Jan. 16, 1997), 8th Dist. No. 70197, discretionary appeal disallowed in *State v. Wheatt* (1997), 78 Ohio St.3d 1512, 679 N.E.2d 309.

{¶ 5} On July 20, 1999, Wheat filed a motion for new trial or in the alternative, a petition seeking postconviction relief in the trial court, arguing

[1]We note that throughout these proceedings Wheatt's last name has been referred to by the State, the courts, and his counsel variously as "Wheatt" and "Wheat." For consistency, we spell his last name in the instant opinion as "Wheat."

that he was unavoidably prevented from discovering exculpatory evidence from eyewitnesses, which the trial court denied. After Wheat appealed, this court affirmed the trial court's decision and reaffirmed Wheat's conviction in *State v. Wheatt* (Oct. 26, 2000), 8th Dist. No. 77292.

{¶ 6} In 2005, Wheat sought leave to file a second motion for new trial after the trial court granted codefendant Johnson's motion for new trial, arguing that since the trial court granted a new trial for Johnson, Wheat was entitled to a new trial as well. The trial court denied Wheat's motion. This court subsequently affirmed the trial court's decision denying Wheat's motion in *State v. Wheatt*, 8th Dist. No. 86409, 2006-Ohio-818, and reversed the trial court's grant of a new trial to Johnson in *State v. Johnson*, 8th Dist. No. 85416, 2005-Ohio-3724.

{¶ 7} On March 4, 2009, Wheat filed a third motion for new trial based on newly discovered forensic testing.

{¶ 8} On March 30, 2009, the State filed a consolidated brief in opposition to this motion, and to an identical motion filed by codefendant Glover.

{¶ 9} On April 16, 2009, the trial court held a joint hearing on the motions.

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

{¶ 11} This appeal followed. Wheat's sole assignments of error states:

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

Standard of Review

{¶ 12} 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.

{¶ 13} 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:**
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> * * *
>
> **(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."

Wheat's Arguments

{¶ 14} Wheat 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. Wheat argues that the evidence collected by the AAS test that forms the forensic evidence linking him to the crime is now not conclusive in light of more recent scientific advancements in this field. As such, Wheat argues 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.

{¶ 15} The recent scientific advancement Wheat relies on is called Scanning Electron Microscopy/Energy Dispersive X-ray Spectroscopy (SEM/EDS). Wheat argues that applying the SEM/EDS test to the evidence in this case would demonstrate that the methodology underlying the opinion

that there was gunshot residue on his hands and clothing, and on the passenger's side door of the black Chevrolet Blazer in which he was a riding, is flawed and scientifically unreliable. In support of this, Wheat 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.) Wheat 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.

{¶ 16} 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. Wheat argues that the mere presence of these elements no longer indicate 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. In short, since AAS testing cannot identify the fused lead-barium-antimony particles indicative of gunshot residue, it is too general to be relied upon any longer.

{¶ 17} In his brief, Wheat points out that since the time he and his codefendants were 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 residue morphology"; not just the presence of these items, as under the former AAS test. (See appellant's exhibit A.)

{¶ 18} Wheat further 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, Wheat argues that 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, entitles him to a new trial. Wheat points to no evidence, however, that he was exposed to any materials that would indicate a false positive test.

{¶ 19} Finally, Wheat argues that the AAS method, and expert testimony underlying it, is no longer admissible under Evid.R. 702, since it has been replaced in the scientific community by SEM/EDS testing. He also argues that the discovery of SEM/EDS testing and its employment as a standard operating procedure or protocol in lieu of AAS testing by the Coroner's Office and other agencies, warrants a new trial.

The State's Arguments

{¶ 20} The State argues that Wheat 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 Wheat to the crime. Further, Wheat's expert, Dr. Nordby, testified at the motion hearing that he could have conducted these tests as far back as 1995, so appellants motions are not timely, and SEM/EDS testing does not constitute "newly discovered evidence" under Crim.R. 33(A)(6).

{¶ 21} On this point, the State cites Wheat's repeated references to a report and testimony from a previous case by a different forensic expert, John Kilty (Kilty),[2] which Wheat'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, Wheat could have, through the exercise of reasonable diligence, discovered this evidence earlier. According to the State, Wheat could have asked for a new trial in a timely manner under the 120-day window contemplated by Crim.R. 33 if he would

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[2]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.

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, Wheat has far exceeded the 120-day deadline under the rule for presenting newly discovered evidence.

Whether Wheat Has
Unduly Delayed in Filing His Motion

{¶ 22} 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 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.)

{¶ 23} In examining the record to determine whether Wheat 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. *Gray* at ¶16.

Here, we find that competent, credible evidence exists to support the trial court's decision granting Wheat's motion for leave to file motion for new trial.

{¶ 24} Contrary to the State's argument, Wheat has not delayed unreasonably in presenting his motion. At the hearing on Wheat'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. Wheat 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.

{¶ 25} 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. Wheat did not receive Dr. Nordby's final report until November 13, 2008. His motion for new trial was filed a mere two months later, on January 12, 2009. The trial court did not abuse its discretion in granting Wheat's motion for leave.

Whether Wheat is Entitled to a New Trial

{¶ 26} In order to prevail on a motion for new trial based upon newly discovered evidence, Wheat 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.

{¶ 27} When applying the six 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 way of interpreting it. It is true, as Wheat points out, that no morphological analysis of the gunshot residue was performed in this case, since SEM/EDS testing is a scientific advancement that simply was not available to him 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.

{¶ 28} The State and Wheat both concede that there is no evidence left to test in this case, since the nitric used in the AAS test makes further testing of the physical evidence impossible. (Tr. 541.) In his brief and in argument, he points to no cases in this jurisdiction or any other jurisdiction in the country affirming the grant of a new trial on this basis. We decline to do so now.

{¶ 29} Testimony during the hearing on Wheat's motion for new trial, and during the trial itself, revealed that the AAS testing conducted in this case returned positive tests results for presence of the three elements consistent with gunshot residue—lead, barium, and antimony. These were found on, among other things, Wheat's palms, on the passenger's side door armrest of the black Chevrolet Blazer that Wheat was alleged to have occupied, and on one of the gloves that were found on the inside of codefendant Johnson's jacket. Additionally, a random group of nitrite particles were found on the back of one of the sleeves of Wheat's jacket. Although this last piece of evidence did not test positive for gunshot residue, it still indicated the presence of elements consistent with it.

{¶ 30} During the hearing on the motions for new trial, Wheat's expert, Dr. Nordby, was forced to admit on cross-examination that these elements are all known by-products of exposure to gunfire. (Tr. 98.) Thus, Wheat's

argument can only be that the presence of these elements could, by some random set of odd circumstances, be the product of something else containing these three elements, not that AAS testing in this case is inherently inaccurate or misleading.

{¶ 31} We note also that the presence of all three key gunshot residue elements, lead, barium, and antimony, are not found together on automotive friction products, such as brake pads, in the same manner that they are found on a gunshot residue sample or test. Further, there was no evidence at trial or in Wheat's posttrial motions, that he was exposed to automotive friction products in the time immediately before or after the shooting.

{¶ 32} Based upon the record before us, the most obvious, logical and clear source for the presence of these elements on these pieces of evidence in this case was from a firearm being discharged.

{¶ 33} Additionally, there is no evidence in the record, other than the intimation in Wheat's brief, that he could have been subject to secondary contamination in a police environment. At trial, the State's expert, Rosenberg, testified at length regarding the chain of custody of the evidence, how she tested the evidence, and that secondary contamination was not a novel issue.

{¶ 34} Lastly, there is nothing about the AAS test in this case, or in the way it was conducted, that would lead this court to believe that the test is

somehow invalid, as Wheat argues. AAS testing is not faulty 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 is even more accurate. We simply cannot say that there is a reasonable or 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.

{¶ 35} Turning to the second and third factors of the *Petro* test, we find that while SEM/EDS testing is not evidence per se, it is clear that this scientific discovery has become accepted since the trial in 1996, and could not have been discovered before the trial, since it was not a scientifically-accepted method for testing gunshot residue.

{¶ 36} As to the fourth *Petro* factor, it is clear that SEM/EDS testing is material to the gunshot residue in this case. If it were able to be employed, it could conceivably determine whether (or if) Wheat was in proximity to a recently-discharged firearm. No party disputes this.

{¶ 37} Under the fifth *Petro* factor, however, it is equally clear that the SEM/EDS testing is merely cumulative to former evidence subjected to the AAS test. It is true that the SEM/EDS test was not scientifically accepted at

the time of trial, but it is impossible to employ that test on the evidence now. In fact, Wheat's own expert, Dr. Nordby, took issue primarily with the State's "methodological" approach, i.e., the employment of the AAS test — not its result. (See motion for new trial hearing at 35.) His conclusion that the AAS test in this case "had no scientific value" was based on his own conclusion that SEM/EDS testing employs a morphological, as opposed to a bulk analysis. Yet, he conceded that "the idea of environmental sources of lead, barium, and antimony is not new," admitted that someone conducting a bulk analysis of these elements under AAS testing could still testify that these chemicals are consistent with gunshot residue, and finally that SEM/EDS testing does not make bulk analysis under AAS scientifically improper (see hearing on motion for new trial at 68-77).

{¶ 38} In essence, Dr. Nordby merely stated the now scientifically and legally accepted fact is that SEM/EDS testing is more accurate than AAS testing in gunshot residue analysis. In this instance, these statements are merely cumulative to what is already in the record, since it is impossible to employ SEM/EDS testing here. AAS testing was the state of the art at the time of trial. Dr. Nordby's testimony does not invalidate that test, or even call the results into question. It merely states that there is now a more accurate test.

{¶ 39} Therefore, under the sixth factor in *Petro*, retrial with SEM/EDS testing procedures would be used only to impeach or contradict the former evidence found under the AAS test. Dr. Nordby's testimony on this issue would merely refine the results of the previous AAS test; it could not *replace* those results in favor of the most accurate result that is scientifically available. See *Petro*.

{¶ 40} Lastly, while Wheat argues in his statement of facts that the eyewitness testimony that helped lead to his conviction is faulty, he does not raise it as an issue in his brief, nor can he. This court disposed of the same eyewitness identification issues intimated by Wheat in *State v. Johnson*, 8th Dist. No. 85416, 2005-Ohio-3724, when it stated that the recanted eyewitness "evidence offered would have had no material effect on the outcome of the trial." Id. at ¶76.

{¶ 41} Accordingly, Wheat's sole assignment of error is overruled. The trial court did not abuse its discretion in denying Wheat'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 the appeal is terminated.

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

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MARY EILEEN KILBANE, PRESIDING JUDGE

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