

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2016-L-086
HORACE K. VINSON, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 06 CR 000099.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor,
Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH
44077 (For Plaintiff-Appellee).

Horace K. Vinson, Jr., pro se, PID: A514-306, Grafton Correctional Institution, 2500
South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Horace K. Vinson, Jr., appeals pro se from the judgment of the
Lake County Court of Common Pleas, filed July 26, 2016, denying his motion for leave
to file a delayed motion for new trial, motion to appoint counsel, and motion for
evidentiary hearing on the motion for leave.

{¶2} In 2006, appellant was convicted, after a jury trial, of felony murder, in
violation of R.C. 2903.02(B), with an accompanying firearm specification pursuant to

R.C. 2941.145, and carrying a concealed weapon, a felony in the fourth degree, in violation of R.C. 2923.12(A)(2). He was sentenced to serve a prison term of fifteen years to life on the murder charge, plus an additional three years for the gun specification, and eighteen months for carrying a concealed weapon, all to be served consecutive to each other, for a total minimum prison term of nineteen and one half years.

{¶3} Appellant timely appealed his conviction. On appeal, this court affirmed. *State v. Vinson*, 11th Dist. Lake No. 2006-L-238, 2007-Ohio-5199. The underlying facts of the case are set forth in that opinion.

{¶4} In February 2007, appellant filed his first petition for postconviction relief, which the trial court denied. This court affirmed the trial court's decision in *State v. Vinson*, 11th Dist. Lake No. 2007-L-088, 2008-Ohio-3059.

{¶5} Appellant filed his second petition for postconviction relief in October 2012. The trial court also denied that petition, and this court affirmed the judgment. *State v. Vinson*, 11th Dist. Lake No. 2013-L-015, 2013-Ohio-5826.

{¶6} Appellant filed his third petition for postconviction relief in April 2014. He requested leave to amend the petition, which was granted, and on July 11, 2014, he filed the amended petition. On December 31, 2014, the trial court denied the amended petition. Appellant did not timely appeal that judgment and instead filed a motion for leave to file a delayed appeal in this court. This court denied that motion. Subsequently, appellant filed a Civ.R. 60(B) motion in the trial court, requesting the court to vacate its December 31, 2014 judgment. The trial court denied the Civ.R. 60(B) motion. Appellant appealed the denial of the Civ.R. 60(B) motion, and this court

affirmed the trial court's decision. *State v. Vinson*, 11th Dist. Lake No. 2015-L-138, 2016-Ohio-7839.

{¶7} On May 10, 2016, almost ten years after his conviction, appellant filed a motion for leave to file a delayed motion for new trial, pursuant to Crim.R. 33, on the basis of newly discovered evidence. Attached to that motion was a copy of the docket from a 2006 criminal case in the Mentor Municipal Court; an affidavit from the private investigator who located and interviewed Leonard Walters in December 2015, one of the main witnesses in appellant's 2006 trial; and an invoice from the court reporter who transcribed the audio file of the private investigator's interview with Mr. Walters. Appellant additionally filed a motion for evidentiary hearing on the motion for leave to file a delayed motion for new trial, and he filed a motion to appoint counsel.

{¶8} Appellant attached his motion for leave to his motion for evidentiary hearing. The motion for leave explained that appellant's previous counsel had hired a private investigator to locate and interview Mr. Walters. The transcript of the interview states it was recorded without Mr. Walters' knowledge. Appellant alleged, therefore, that Mr. Walters' statements were "unguarded." Appellant maintained the interview contained new evidence that demonstrates Mr. Walters was unable to see the shooting in the way he testified at trial.

{¶9} Also attached to the motion for evidentiary hearing were the following: a copy of a case summary from the Cuyahoga County Court of Common Pleas; a copy of the docket and case information from a 2006 criminal case in the Mentor Municipal Court; a transcript of the 9-1-1 call placed by Mr. Walters in 2006; a transcript of the direct, cross, and recross examination of Mr. Walters from the trial in 2006; a transcript

of the interview of Mr. Walters by the private investigator on December 21, 2015; transcripts of the 2006 police interviews of appellant, Jennifer Gedeon, and appellant's father; affidavits from appellant's father and Jennifer Gedeon, dated March 20, 2007; Michael J. Kutz's statement from the Willowick Police Department, dated January 28, 2006; and an undated affidavit from Michael J. Kutz.

{¶10} On June 6, 2016, appellee, the state of Ohio, filed a response to appellant's motion for leave to file a delayed motion for new trial, disputing appellant's contentions that he was unavoidably prevented from discovering the new evidence. Appellee argued appellant failed to present clear and convincing evidence that the delay was unavoidable. On June 15, 2016, appellant filed a reply to appellee's response.

{¶11} On July 26, 2016, the trial court entered judgment, denying appellant's motions without a hearing. The trial court found appellant did not meet his burden of demonstrating he was unavoidably prevented from timely discovering the evidence at issue. The trial court also stated:

Mr. Walters' ability to see the shooting was thoroughly questioned both by the State and by Defendant's trial counsel during his testimony. Any discrepancies between his trial testimony and his 'unguarded' statements ten years later would appear to be the result of the passage of time. This is not a situation where Mr. Walters has recanted his testimony or expressed a desire to come forward with alternate testimony.

{¶12} Appellant filed a timely notice of appeal on August 18, 2016.

{¶13} On appeal, appellant assigns two assignments of error:

[1.] The trial court erred and abused its discretion in failing to find that Appellant was unavoidably prevented from discovering the new evidence upon which his Motion for new Trial relies, where the determination of the facts was unreasonable in light of the evidence.

[2] The trial court erred and abused its discretion in refusing to conduct a hearing on the ‘Leave’ motion, denying appellant his right to due process of law under the state and federal constitutions.

We address appellant’s assignments of error together.

{¶14} Whether to grant leave to file a delayed motion for new trial is left to the sound discretion of the trial court. *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990).

{¶15} Under Crim.R. 33(B), a motion for new trial on the ground of newly discovered evidence must be filed within 120 days after the day the verdict was rendered “unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented” from discovering the evidence he relies on within the 120-day period. When the motion for new trial is made outside of the 120-day period, the trial court must find by clear and convincing proof that the movant was unavoidably prevented from filing the motion within the 120-day window. See *State v. Elersic*, 11th Dist. Geauga No. 2006-G-2740, 2007-Ohio-3371, ¶23 (citation omitted); *State v. Trimble*, 11th Dist. Portage No. 2013-P-0088, 2015-Ohio-942, ¶13. If the trial court so finds, then the movant must file his motion within seven days of the trial court’s decision. *Elersic, supra*, at ¶23 (citations omitted). “A trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay.” *Trimble, supra*, at ¶12 (citation omitted).

{¶16} “Clear and convincing evidence is that measure of proof that is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt in criminal cases; clear and convincing proof produces in the mind of the fact finder a firm belief or conviction as to the facts sought to be established.” *State v. Vinson*, 11th Dist. Lake No. 2011-L-172, 2012-Ohio-3421, ¶30, citing *Schiebel, supra*, at 74.

{¶17} A defendant is “unavoidably prevented” from filing a motion for new trial if the defendant “had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence.” *State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468, ¶17, citing *State v. Walden*, 19 Ohio App.3d 141, 145-146 (10th Dist.1984).

{¶18} This court has previously outlined the three options a trial court has when a defendant files a motion for leave to file a motion for new trial. *Trimble, supra*, at ¶16. First, if it determines the documents in support of the motion on their face do not demonstrate the movant was unavoidably prevented from discovering the evidence, it may either overrule the motion or hold a hearing. See *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶19 (2d Dist.) (“a trial court has discretion when deciding whether to grant leave to file a motion for new trial, or whether to hold a hearing on the issue”). An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black’s Law Dictionary* 11 (8th Ed.2004). Second, if the trial court determines the documents submitted clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, the court must grant the motion for leave and allow the motion for new trial to be filed. See Crim.R. 33(B). Third, if the trial court determines the documents on their face “support [the movant’s] claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there * * * is clear and convincing proof

of unavoidable delay.” *State v. York*, 2d Dist. Greene No. 99-CA-54, 2000 WL 192433, *2 (Feb. 18, 2000) (citation omitted).

{¶19} The jury verdict in this case was rendered on August 23, 2006. Appellant filed his motion for leave almost ten years after the verdict was entered. Because this time period is outside of the 120-day period under Crim.R. 33(B), appellant was required to show by clear and convincing proof that he was unavoidably prevented from discovering the evidence.

{¶20} Appellant’s argument that he was unavoidably prevented from discovering Mr. Walters’ testimony is primarily based on his assertions that (1) Mr. Walters joined the military immediately following trial; (2) Mr. Walters changed his address; (3) and appellant was incarcerated and indigent with no way to secure an investigator to locate Mr. Walters. The documents provided by appellant do not demonstrate these circumstances by clear and convincing proof.

{¶21} The transcript from the private investigator’s interview of Mr. Walters in December 2015, shows that at the time of the interview Mr. Walters resided at a different address than where he resided at the time of the shooting. However, this does not explain why appellant was unable to locate Mr. Walters for almost ten years or ascertain his whereabouts prior to December 2015. Appellant alleges Mr. Walters joined the military immediately following the trial in 2006 but has failed to provide any verification of that fact or any other information about his whereabouts for the balance of the ten-year period. The other documents provided by appellant appear to be offered in support of appellant’s assertion that Mr. Walters’ “unguarded” statements shed new light on his trial testimony. However, these documents do not, on their face, demonstrate

appellant was unavoidably prevented from discovering the new evidence within the 120-day time period.

{¶22} Appellant further argues the trial court abused its discretion in overruling his motion for leave because the trial court was required to make a finding of unavoidable delay prior to considering the credibility of the evidence underlying appellant's delayed motion for new trial. Appellant contends the trial court partly based its ruling to overrule appellant's motion for leave on the merits of his delayed motion for new trial.

{¶23} In its judgment entry the trial court stated, "Defendant has not demonstrated that he was unavoidably prevented from filing a motion for new trial within the time prescribed because discrepancies noted in Mr. Walters' statements ten years after the events in question cannot be considered new evidence." The trial court was not ruling on the credibility of the evidence, but noting that appellant was not prevented from discovering the evidence, in part because it was not, in fact, newly discovered. Mr. Walters was thoroughly questioned at trial by both the state and appellant's trial counsel. Appellant argues the questioning was "immaterial" because Mr. Walters felt pressured to testify favorably for the prosecution. Appellant asserts that at the time of trial Mr. Walters had "pendent [sic] criminal charges which were simply dropped following his trial testimony favorable to the prosecution." With his motion for evidentiary hearing, appellant attached a copy of the docket from a 2006 criminal case in the Mentor Municipal Court, which he alleges is evidence of the charges the prosecution dropped in exchange for Mr. Walters' favorable testimony. However, this document is not certified, and, furthermore, there is no evidence in the record to support

appellant's assertions that charges were dropped. In addition, there is no explanation as to why this public record could not have been discovered in 2006.

{¶24} For the foregoing reasons, appellant's assignments of error are without merit. The trial court did not abuse its discretion in denying appellant's motion for leave to file a delayed motion for new trial without a hearing.

{¶25} The judgment of the Lake County Court of Common pleas is affirmed.

DIANE V. GRENDALL, J.,

COLLEEN MARY O'TOOLE, J.,

concur in judgment only.