[Cite as *State v. Clumm*, 2010-Ohio-342.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 08CA32
	:	
v.	:	
	:	**DECISION AND**
WILLIAM CLUMM,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 1-28-10

APPEANCES:

William A. Clumm, Chillicothe, Ohio, pro-se.

C. David Warren, Athens County Prosecutor, and George J. Reitmeier, Athens County Assistant Prosecutor, Athens, Ohio, for Appellee.

Kline, J.:

{¶1} William Clumm appeals the trial court's denial of his motion for leave to file a delayed motion for a new trial and his motion for appointed counsel. On appeal, Clumm contends that he had a right to appointed counsel under Crim.R. 44. We disagree, holding that Crim.R. 44 only affords a defendant the right to appointed counsel through his or her first appeal as of right. Similarly, the Ohio and United States Constitutions do not afford Clumm the right to appointed counsel after his first appeal as of right. Clumm next contends that the trial court erred when it dismissed his motion for leave to file a delayed motion for a new trial. Because we find any error harmless, we disagree.

Accordingly, we overrule Clumm's assignments of error and affirm the judgment of the trial court.

I.

{¶2} On June 11, 1977, William A. Clumm was convicted of the aggravated murder of his wife, which took place on April 16, 1977. In 2007, the Ohio Adult Parole Authority denied Clumm's application for parole. Based on evidence admitted at that hearing, Clumm filed a motion on September 29, 2008 for leave to file a delayed motion for a new trial under Crim.R. 33(A)(6).

{¶3} This motion stated, "Movant has used reasonable diligence to find and discover the new evidence but [the witness] concealed her knowledge. Thusly with [no] evidence to connect her with the crime there was no way to know of her existence as a witness." The motion also included an affidavit from Wendie A. Gerus, the Assistant State Public Defender assigned to represent Clumm at his Parole Board hearing. Gerus's affidavit indicated that "[a]ccording to [Clumm's] former attorneys, the prosecutor's theory of the case was that [Clumm], a medical technician, had drugged his wife with ether to facilitate her murder." The affidavit further indicated that the newly discovered witness testified that she had "been camped out along with her husband and children along a creek in Ross County the evening of April 16, 1977. At some point during that night, the witness testified she heard a female screaming and begging for her life to be spared. The body of Francine Clumm was found in that same creek the following day." The affidavit noted that there was no explanation given for why this witness did not testify at the initial trial.

{¶4} Clumm contends that this testimony demonstrates that he could not have committed the murder.

{¶5} The trial court denied Clumm's motion for leave to file a delayed motion for a new trial and Clumm's motion for appointment of counsel because Clumm failed to set out a prima facie case for a new trial. Clumm appeals and raises the following four assignments of error for our review: I. "IT WAS ERROR FOR THE COURT TO FAIL TO APPOINT COUNSEL TO PRESENT APPELLANT IN A CRIMINAL RULE 33(B) PROCEEDING AND TO FAIL TO HOLD A HEARING AS REQUIRED IN CRIMINAL RULE 44(D)[.]" II. "IT IS BOTH ERROR AND ABUSE OF JUDICIAL DISCRETION FOR THE COURT TO DISMISS A PENDING ISSUE BASED ON FAILURE TO ESTABLISH ON NON PENDING ISSUE BY DISMISSING THE NON-PENDING ISSUE." III. "IT WAS ERROR FOR THE COURT TO DISMISS A CRIMINAL RULE 33(B) MOTION FOR LEAVE TO [FILE] A DELAYED MOTION FOR A NEW TRIAL BY TREATING IT AS THOUGH IT [WAS A] CRIMINAL RULE 33(A) MOTION SINCE CRIMINAL RULE 33(C) APPLIES ONLY TO SPECIFIC CRIMINAL RULE 33(A) MOTIONS[.]" IV. "IT WAS ERROR FOR THE COURT TO DENY THE MOTION FOR APPOINTMENT OF COUNSEL AND FOR LEAVE TO FILE A DELAYED [MOTION] FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WHEN AN [UNREBUTTED] PRIME FACIE CASE HAS BEEN MADE."

II.

{¶6} Notwithstanding his four assignments of error, Clumm's argument revolves around two issues: First, whether the trial court erred in its conclusion that Clumm had

no right to publicly appointed counsel. Second, whether the trial court appropriately dismissed his motion for leave to file a delayed motion for a new trial.

A. Right to Counsel

{¶7} Clumm first contends that the trial court erred when it refused to appoint him counsel.

{¶8} Clumm raises an issue that involves the interpretation of Crim.R. 44 and various constitutional provisions as they relate to the right to counsel. Hence, Clumm's arguments are legal questions that we review de novo. See, e.g., *State v. Mollohan*, Washington App. No. 09CA3, 2009-Ohio-5133, at ¶6; *State v. Day*, Adams App. Nos. 08CA865 & 08CA866, 2009-Ohio-3755, at ¶26; *State v. Downing*, Franklin App. No. 08AP48, 2008-Ohio-4463, at ¶6, citing *Stuller v. Price*, Franklin App. No. 03AP-30, 2003-Ohio-6826, at ¶14; *State v. Green*, Lawrence App. No. 07CA33, 2008-Ohio-2284, at ¶7.

{¶9} Crim.R. 44 requires the appointment of counsel "from [a defendant's] initial appearance before a court through [the defendant's] appeal as of right[.]" Crim.R. 44(A).

{¶10} In addition, a defendant's right to appointed counsel under the United States Constitution "extends to the first appeal of right, and no further." *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555. Likewise, under the Ohio Constitution the right to appointed counsel does not extend to post conviction proceedings. *State v. Crowder* (1991), 60 Ohio St.3d 151, 152. Ohio Courts have also held that the right to appointed counsel does not extend to post-sentence motions filed under the Criminal Rules. See *State v. McNeal*, Cuyahoga App. No. 82793, 2004-Ohio-50, at ¶6-8 ("Ohio courts have not

granted greater rights than those in the federal constitution" and concluding that the movant had no right to appointed counsel for his Crim.R. 32.1 motion), citing *State v. Watts* (1989), 57 Ohio App.3d 32, 33.

{¶11} Here, we decided Clumm's first appeal on February 13, 1980. *State v. Clumm* (Feb. 13, 1980), Athens App. No. CA 926. Clumm filed his present motion for a new trial on September 29, 2008. Therefore, Clumm's right to appointed counsel under either the Criminal Rules or the Ohio or United States Constitutions has long since passed.

{¶12} Accordingly, we overrule Clumm's first assignment of error.

B. Motion for a New Trial

{¶13} Clumm's remaining three assignments of error all claim that the trial court erred when it dismissed his motion for leave to file a delayed motion for a new trial under Crim.R. 33(A)(6).

{¶14} "The decision by a trial court whether to grant leave to file an untimely motion for new trial is subject to review for abuse of discretion." *State v. Bates*, Franklin App. No. 09AP-583, 2009-Ohio-6422, at ¶10, citing *State v. West*, Franklin App. No. 09AP-474, 2009-Ohio-5203, at ¶9. 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.

{¶15} Crim.R. 33(A)(6) states that a court may grant a new trial when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶16} A defendant must file a motion for a new trial based on newly discovered evidence within 120 days "after the day upon which the verdict was rendered[.]" Crim.R. 33(B). If the defendant fails to file within this time limit then the rule sets out a two-step process for handling a delayed motion. See *Coon* at ¶6, fn. 1. First, the defendant must obtain leave to file such a motion. Id. And after the defendant obtains leave, then the motion for a new trial must be filed within seven days. Id.

{¶17} In order to obtain leave to file a delayed motion for a new trial, the defendant must demonstrate "by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely[.]" Crim.R. 33(B).

{¶18} Here, Clumm had to demonstrate, by clear and convincing evidence, that he was unavoidably prevented from the discovery of the evidence on which he must rely.

{¶19} "'Clear and convincing evidence' is evidence that will produce in the factfinder's mind a firm belief or conviction as to the facts sought to be established." *Fitzpatrick v. Palmer*, Lawrence App. No. 09CA7, 2009-Ohio-6008, at ¶23, citing *State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. "It is considered a higher degree of proof than a mere 'preponderance of the evidence,' * * * but it is less stringent than the 'beyond a reasonable doubt' standard[.]" *Fitzpatrick* at ¶23.

{¶20} A party "is unavoidably prevented from filing a motion for new trial within [the time limit] after the verdict 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 in the exercise of reasonable diligence." *State v. Walden* (1984), 19 Ohio App.3d 141, at paragraph one of the syllabus.

{¶21} The State notes the lengthy delay in this case between when Clumm learned of this newly discovered evidence and when Clumm filed his motion for leave to file a delayed motion for a new trial. According to the affidavits filed in this case, Clumm learned of the existence of this witness on July 12, 2007, but did not file a motion for a new trial until September 29, 2008, an elapsed time of 445 days. However, this delay is not a sufficient justification for denying a defendant leave to file a delayed motion for a new trial. See *Pinkerman* at 161.

{¶22} The affidavit of Gerus provides no evidence on whether Clumm was unavoidably prevented from discovering the witness. In Clumm's original motion there are only two statements that might qualify as evidence that he was unavoidably prevented from discovering the identity of the witness before trial.

{¶23} First, in his motion, Clumm states "[m]ovant has used reasonable diligence to find and discover the new evidence but [the witness] concealed her knowledge. Thusly with [no] evidence to connect her with the crime there was no way to know of her existence as a witness." However, "the mere assertion in [Clumm's] motion that he was unavoidably prevented from discovering [this evidence is] not sufficient on its face to carry [his] burden of proving unavoidable delay by clear and convincing evidence." *State v. West*, Franklin App. No. 09AP-474, 2009-Ohio-5203, at ¶12, citing *State v. Bush*, Franklin App. No. 08AP-627, 2009-Ohio-441, at ¶11; *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, at ¶21.

{¶24} Second, Clumm attached his affidavit to his motion, and the affidavit stated "[t]hat affiant supplied business records of the deceased and names of all known contacts of the deceased to both the authorities and to legal counsel both of which attempted to locate various witnesses without success." No information is provided to explain how the witness knew to appear at Clumm's parole hearing. No information is provided to explain what Clumm's attorneys did with the information, which Clumm provided. Nor did Clumm provide any information on how the witness could have been found or why reasonable efforts were incapable of discovering her existence.

{¶25} Clumm bore the heavy burden of producing in the trial court's mind a firm conviction or belief that Clumm was unavoidably prevented from discovering the witness's existence within 120 days after the verdict was rendered in his trial. Here, Clumm provided only an explanation of what information he turned over to his lawyers. He provided no explanation for what his lawyers did with that information or what means they used to attempt to locate witnesses. Nor did he provide any explanation for why these means were insufficient to discover the witness at issue. Hence, we find that Clumm has failed to carry his burden.

{¶26} In part, Clumm contends that the trial court erroneously dismissed his motion for leave to file a delayed motion for a new trial because the trial court treated the motion as simply a motion for a new trial (see Clumm's second and third assignments of error). The trial court's entry did indeed dismiss his motion for leave to file a delayed motion for a new trial as if it were simply a motion for a new trial; "[d]efendant failed to attach an affidavit of the witness to his motion as required by [Crim.R. 33(A)(6)]." Journal Entry Denying Motions for Leave to File a Delayed Motion for a New Trial.

However, unless a trial court has granted a defendant leave to file a delayed motion for a new trial, the motion for a new trial is not properly before the court. *State v. Hunt* (Jun. 11, 1986), Scioto App. No. 1553, citing *State v. Kiraly* (1977), 56 Ohio App.2d 37, 52. The confusion of the trial court is understandable. Clumm barely addressed the narrow question for the trial court to consider on granting leave, whether he was unavoidably prevented from discovering this evidence. Clumm did, however, address the merits of his motion under Crim.R. 33(A)(6) when he argued the evidence was not cumulative or impeaching and would produce an acquittal in a new trial. See *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350, citing *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶27} We find any error in the trial court's consideration harmless. "'By repeated decisions of this court it is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as a basis thereof.'" *State v. Chesser*, Athens App. No. 06CA18, 2006-Ohio-6297, at ¶19, quoting *Hayes v. City of Toledo* (1989), 62 Ohio App.3d 651, 653 (other citations omitted).

{¶28} Here, we find that the trial court would have abused its discretion if it had granted Clumm's motion for leave. Clumm bore the burden to establish by clear and convincing evidence that he was unavoidably prevented from discovering this witness. The motion provided no information on efforts made to locate any witnesses for the original trial. In addition, the motion provided no information whatsoever on why this particular witness was not found before the first trial. As such, any error in the trial

court's consideration of Clumm's motion for leave to file a delayed motion for a new trial is harmless.

{¶29} Accordingly, we overrule Clumm's second and third assignments of error.

{¶30} In his fourth assignment of error, Clumm appears to contend that the trial court erred in determining that Clumm had failed to present a prima facie case. We find this assignment of error, as argued in the brief, almost incomprehensible. Clumm may be claiming that he had properly supported a motion for a new trial under Crim.R. 33(A)(6). If this is the case, then we reject this argument because, as noted above, any motion by Clumm for a new trial was not properly before the trial court. However, in the argument section of his brief, Clumm appears to concentrate on the trial court's failure to appoint counsel. As discussed above, Clumm had no right to appointed counsel either under Crim.R. 44 or the Constitutions of the United States or Ohio.

{¶31} Accordingly, we overrule Clumm's fourth assignment of error.

III.

{¶32} Having overruled all of Clumm's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay the 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 Athens County 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. Exceptions.

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.