

[Cite as *State v. West*, 2018-Ohio-1784.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 17CA3810
 :
 vs. :
 :
 JOHN H. WEST, JR., : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

John H. West, Jr., Orient, Ohio, pro se.

Mark E. Kuhn, Scioto County Prosecutor, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:4-25-18
ABELE, J.

{¶ 1} John H. West, Jr., defendant below and appellant herein, appeals from the Scioto County Common Pleas Court judgment that denied his motion for leave to file a delayed motion for new trial after his conviction and sentence for (1) three counts of drug trafficking in violation of R.C. 2925.03; (2) two counts of drug possession in violation of R.C. 2925.11; and (3) possession of criminal tools in violation of R.C. 2923.24.

{¶ 2} Appellant assigns one error for review:

“THE TRIAL COURT ABUSED ITS DISCRETION, AND COMMITTED [PREJUDICIAL] ERROR WHEN THE TRIAL

COURT FAIL[ED] TO CONDUCT [AN] EVIDENTIARY HEARING TO DETERMINE WHETHER APPELLANT JOHN H. WEST, JR. WAS UNAVOIDABLY PREVENTED FROM DISCOVERING NEWLY DISCOVERED [TESTIMONIAL EVIDENCE] OF BREON KELLY'S RECANTED TESTIMONY AND A FAIR MECHANISM FOR FACTUAL DEVELOPMENT ON HIS MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL INSTANTER AND MOTION FOR NEW TRIAL PURSUANT TO CRIM.R. 33 (A)(6). IN VIOLATION OF DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶ 3} During an investigation into the delivery of drugs from Michigan to Portsmouth, Scioto County authorities became aware of the activities of appellant and his then girlfriend, Shelby Nelson.¹ For a number of months, both appellant and Nelson transported drugs from Franklin County to Scioto County, where they supplied drugs for local sale from Brandi Woods' Portsmouth apartment. Portsmouth Police involved with the Southern Ohio Drug Task Force arranged for three controlled purchases from Brandi Woods. Later, police obtained a search warrant for Woods' apartment and, during the warrant's execution, encountered several individuals, including appellant. Authorities found drugs in the apartment, a jeep parked nearby that appellant and Nelson used to travel to Columbus, and over \$2,000 cash in the pockets of a pair of appellant's shorts.

{¶ 4} At the jury trial, Shelby Nelson confirmed that, several times a week in 2011, she and appellant had been "running" cocaine (that they "cooked" into crack) and other drugs from Columbus to Portsmouth. Usually, they would obtain one and one half to two ounces of cocaine per unit. Brandi Woods testified that appellant used her apartment to traffic drugs in Portsmouth.

¹ These facts are taken from this court's prior decision that affirmed appellant's conviction and sentence. See *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941.

Woods further related that (1) the drugs that she sold in the three controlled buys to a police informant all came from appellant, and (2) the other person present at her apartment during the search warrant's execution, Breon Kelly, is also a "runner" for appellant and sells drugs in Portsmouth. Appellant testified in his own behalf and, although he admitted that he was present at Woods' apartment during the search warrant's execution, he denied any involvement in drug trafficking.

{¶ 5} After hearing the evidence adduced at trial, on July 31, 2012 the jury returned guilty verdicts on all six counts. After merging three counts into the other counts, the trial court imposed a ten year prison sentence for the first trafficking charge (count one), twelve months for the second trafficking charge (count three) and twelve months for the possession of criminal tools. The court further ordered that the sentences be served consecutively for an aggregate twelve year sentence. We affirmed appellant's convictions and sentence. See *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941. Subsequently, appellant filed a motion for delayed appeal that the Supreme Court of Ohio denied. *State v. West*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882.

{¶ 6} On April 28, 2017, appellant filed a motion for leave to file a delayed motion for new trial. The trial court denied that motion on August 10, 2017. This appeal followed.

{¶ 7} Generally, an appellate court applies the abuse of discretion standard of review when reviewing a trial court's denial of a motion for leave to file a delayed motion for new trial. *State v. Hoover-Moore*, 2015-Ohio-4863, 50 N.E.3d 1010, ¶ 14 (10th Dist.); *State v. Seal*, 2017-Ohio-116, 75 N.E.3d 1035, ¶ 9 (4th Dist.). An appellate court also applies the abuse of discretion standard of review to a trial court's decision whether to conduct an evidentiary hearing on a motion for leave to

file a delayed motion for new trial. *Hoover-Moore, supra; State v. Jones*, 9th Dist. Summit No. 26568, 2013-Ohio-2986, ¶ 8. An abuse of discretion implies that the trial court's decision is arbitrary, unconscionable, or unreasonable. *State v. Minton*, 2016-Ohio-5427, 69 N.E.3d 1108, ¶ 19 (4th Dist.); *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994).

{¶ 8} Crim.R. 33(A) allows a defendant to request a new trial “[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.” Crim.R.33(A)(6). A motion for a new trial must be filed within 14 days after the verdict is rendered, “except for the cause of newly discovered evidence.” Crim.R.33(B). However, a motion for new trial based on newly discovered evidence must be filed within 120 days after the day the verdict was rendered, unless the defendant shows by “clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely * * *.” *Id.* “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 and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence.” *Hoover-Moore* at ¶ 13, citing *State v. Berry*, 10th Dist. Franklin No. 06AP-803, 2007-Ohio-2244, ¶ 19. “If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.” Crim.R. 33(B).

{¶ 9} In the case sub judice, although appellant did not file his motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict, he correctly sought leave from

the trial court to file a delayed motion. *See Hoover-Moore* at ¶ 13, citing *Berry* at ¶ 19; *Seal* at ¶ 11.

The trial court, however, denied the motion for new trial as untimely and also pointed out that appellant failed to satisfy the six criteria necessary to grant a new trial. Although the trial court did not explicitly address whether appellant was unavoidably prevented from discovering the evidence that he relied on in his motion, see *State v. Covender*, 2012-Ohio-6105, 988 N.E.2d 582, ¶ 13 (9th Dist.), we nevertheless conclude that the trial court's error constitutes harmless error. *See Seal, supra*, at ¶ 11.

{¶ 10} As this court recently outlined in *Seal*, Ohio courts have determined that a defendant must file the motion for leave to file a delayed motion for new trial within a reasonable time after the discovery of the evidence. *Seal* at ¶ 12, citing *State v. Griffith*, 11th Dist. Trumbull No. 2005-T-0038, 2006-Ohio-2935, ¶ 15; *State v. Cleveland*, 9th Dist. Lorain No. 08CA009406, 2009-Ohio-397, ¶ 49. The Eighth District explained: "A trial court must first determine if a defendant has met his burden of establishing by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within the statutory time limits. If that burden has been met but there has been an undue delay in filing the motion after the evidence was discovered, the trial court must determine if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay." *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063, *3 (Oct.9, 1997).

{¶ 11} Although Crim.R. 33(B) is silent regarding a time limit for the filing of a motion for leave to file a delayed motion for new trial, "a trial court may require a defendant to file his motion for leave to file a motion for new trial *within a reasonable time* after he discovers new evidence. Allowing the defendant to file a motion [for] leave [to file] a motion for a new trial at any time

would frustrate the overall objective of the criminal rules in providing the speedy and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable delay.” (Emphasis added). *State v. York*, 2d Dist. Greene No. 2000CA70, 2001 WL 332019, *3-4 (Apr.6, 2001).

{¶ 12} In the case sub judice, appellant submitted his codefendant’s affidavit (Breon Kelly), who did not testify at trial. In his affidavit, Kelly claims responsibility for the drugs and claims that appellant had no knowledge: “I informed the detectives only what transpired upon my arrest, that I had brought down 42 grams of crack cocaine, which my codefendant John H. West didn’t have any knowledge of any drugs.” Kelly further avers that the reason he did not come forward earlier is because he was “trying to make a deal myself.”

{¶ 13} The state responds that “[i]t is difficult to entertain that this Defendant, in the exercise of due diligence, could not have discovered this ‘new evidence’ earlier than five years after trial.” Appellant would have been aware of the existence of the alleged grounds that supports his delayed motion for new trial since the crimes occurred, but did not file his motion for leave until August 10, 2017. “Crim.R. 33(B) does not allow a defendant to wait for further evidence to arise that will bolster his case.” *Berry* at ¶ 39, citing *Stansberry* at *3.

{¶ 14} Thus, it is apparent that appellant failed to establish, by clear and convincing evidence, that he was unavoidably prevented from discovering the evidence of Breon Kelly’s alleged confession. Consequently, the trial court properly found the motion to be without merit.

{¶ 15} Appellant argues that trial court failed to explain why Kelly’s affidavit is insufficient under Crim.R. 33. However, to prevail on the merits, appellant had to show that all six criteria apply. “In order to prevail on a motion for new trial based on newly discovered evidence, the

offender bears the burden of demonstrating to the trial court 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. Ward*, 4th Dist. Meigs No. 05CA13, 2007-Ohio-2531, ¶ 43, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. As the state points out, by appellant’s own admission the “new evidence” would merely impeach the testimony of a codefendant who did testify at trial and/or contradict the previous statements that Breon Kelly had given to the officers. Thus, this “new” evidence will not exonerate appellant because ample evidence established that appellant was either the principal offender or complicit with the codefendants, including, but not limited to: (1) appellant providing a false name to drug officers, (2) appellant holding \$2142 with no proof of legitimate employment; (3) codefendant Kelly holding \$450 in cash with no proof of legitimate employment; (4) appellant’s jail calls regarding the underlying case; (5) the nature of appellant’s text messages; (6) the testimony of the codefendants; and (7) the intelligence that law enforcement received. Moreover, this court previously concluded that appellant’s prior claim that the verdicts are against the manifest weight of the evidence are without merit, noting: “[o]nce again, our review of the record reveals ample competent, credible evidence to support the jury’s conclusion. Appellant’s shorts contained a large amount of cash. A cell phone that appellant used contained numerous text messages related to drug activity.” *State v. West, supra*, at ¶ 24. Here, the trial court concluded that appellant’s motion was both untimely and without merit, noting that the motion failed to satisfy the six criteria necessary to grant a new trial.

{¶ 16} Therefore, after our review, we conclude that the trial court properly denied

appellant's motion for leave to file a delayed motion for new trial. Just as in *Seal*, even if we assume, *arguendo*, that appellant was unavoidably prevented from filing his motion for a new trial within the time limit set forth in the rule, appellant has nevertheless unreasonably delayed filing his motion.

{¶ 17} Accordingly, based upon the foregoing reasons we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Supreme Court of Ohio in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, 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.