[Cite as *State v. Chambers*, 2021-Ohio-3388.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 20CA1125
vs.	:	
DAVID CHAMBERS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Eric J. Allen, Columbus, Ohio for appellant.[1]

C. David Kelley, Adams County Prosecuting Attorney, and Mark R. Weaver and Ryan M. Stubenrauch, Assistant Adams County Prosecuting Attorneys, West Union, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:8-24-21
ABELE, J.

{¶1} This is an appeal from an Adams County Common Pleas Court judgment that denied a motion by David Chambers, defendant below and appellant herein, for leave to file a new trial motion.

{¶2} Appellant raises the following assignments of error for review:

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[1] Different counsel represented appellant during the trial court proceedings.

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR LEAVE.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING.

{¶3} In 2010, a jury found appellant guilty of two counts of murder in violation of R.C. 2903.02(B), with predicate offenses of felonious assault and child endangering. Both charges involved the death of appellant's 18-month-old daughter. This court affirmed appellant's judgment of conviction and sentence. *State v. Chambers*, 4th Dist. Adams No. 10CA902, 2011-Ohio-4352.[2]

{¶4} In 2019, appellant filed a motion to request leave to file a new trial motion and asserted he was unavoidably prevented from discovering new evidence to timely file his new trial motion. In particular, appellant alleged that after his 2010 trial, new medical studies now support his contention that a short-distance fall could have caused the victim's injuries. Appellant asserted that, at the time of his trial, no one would consider a short fall or a fall down stairs a cause of this injury. Appellant's motion included a transcript and affidavit of Dr. John Galaznik, physician

[2]Our prior decision sets forth in detail the underlying facts of the offenses.

and board-certified pediatrician with expertise in the area of physical injury to infants and small children. The affidavit states, inter alia, that the American Academy of Pediatrics (AAP) has changed position concerning Shaken Baby Syndrome (SBS)/Abusive Head Trauma (AHT).

{¶5} The state's memorandum in opposition asserted that appellant failed to present clear and convincing evidence that he was unavoidably prevented from discovering this alleged change in science. The state noted that "this manufactured scientific controversy has been paraded before trial courts across the country in desperate and unavailing postconviction relief attempts since at least 2006." The state further pointed out that the United States Supreme Court rejected identical post-conviction relief scientific claims in *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011). Moreover, while appellant claimed he could not discover this information sooner than 2019, the state argued that appellant's motion cited scientific articles from 2010, 2012, 2014, and 2016. The state thus claimed that appellant presented nothing new, and offered no reasonable explanation for his decade-long delay to seek a new trial.

{¶6} After consideration, the trial court denied appellant's motion. The court concluded that appellant failed to demonstrate why the "newly discovered" evidence proffered in support of his

motion could not, with reasonable diligence, have been discovered and produced at trial:

> Based upon Dr. Galaznik's affidavit alone, it is clear that relevant studies were published prior to the trial and, by extension, that the medical community was aware of alternate theories of causation of the death of other infants and young children in similar cases. Likewise, legal documentation existed at the time of the trial related to the significant developments and alternate theories of causation in the medical community related to SBS/AHT.

The court further wrote:

> Defendant's "newly discovered" evidence is akin to a conflicting medical opinion concerning the same evidence that was presented or could have been presented at the trial of this matter. Defendant knew or could have learned of the information supporting his current claim. He failed in his motion and affidavit to demonstrate how or why he was unavoidably prevented from discovering the evidence through the exercise of reasonable diligence. Defendant's affidavit does not explain how or when he came to learn the evidence on which he relies. Lastly, Defendant fails to explain why neither he nor his trial counsel could not have discovered this evidence until 2019.

{¶7} Thus, the trial court determined that, because the defendant's evidence was discoverable at the time of trial or shortly thereafter, the defendant failed to file his motion within a reasonable time without adequate justification. The court further concluded that, although some experts disagree about SBS/AHT, it remains an accepted theory in Ohio and other states. This appeal followed.

I.

{¶8} In his first assignment of error, appellant asserts that the trial court erred by denying his motion for leave to file a new trial motion.

{¶9} Generally, an appellate court will review a trial court decision to grant or to deny a motion for a new trial under the abuse of discretion standard. The granting of a motion for a new trial upon the ground of newly discovered evidence is necessarily committed to the court's discretion. *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947); *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917). *See also State v. Seal*, 2017-Ohio-116, 75 N.E.3d 1035, ¶ 9 (4th Dist.); *State v. Bennett*, 4th Dist. Scioto No. 16CA3765, 2017-Ohio-574, ¶ 9; *State v. Hoover-Moore*, 2015-Ohio-4863, 50 N.E.3d 1010, ¶ 14 (10th Dist.); *State v. Waddy*, 10th Dist. Franklin No. 15AP-397, 2016-Ohio-4911, ¶ 20; *State v. Hill*, 8th Dist Cuyahoga No. 102083, 2015-Ohio-1652, ¶ 16. An abuse of discretion implies that a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *State v. Minton*, 2016-Ohio-5427, 69 N.E.3d 1108, ¶ 19.

{¶10} Crim.R. 33 governs new trials. Subsection (A)(6) provides:

(A) 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.
>
> (B) Application for "new trial shall be made by motion *** filed within fourteen days after the verdict *** unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion ***.

{¶11} "The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner." *Waddy* at ¶ 19, citing *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11. "Clear and convincing evidence is 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *State ex rel. Cincinnati Enquirer v. Deters,* 148 Ohio St.3d 595, 2016-Ohio-

8195, 71 N.E.3d 1076, ¶ 19, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶12} "A party is 'unavoidably prevented' from filing a motion for a 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; *Seal* at ¶ 10.

{¶13} "Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived." Crim.R. 33(B). If a defendant shows that he was unavoidably prevented from discovering the evidence, the defendant must then file a new trial motion "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." *Id.* As we held in *Bennett*, *supra,* the rule contemplates that a defendant seeking a new trial after the one hundred twenty-day period obtain permission from the trial court to file the motion. *Bennett* at ¶ 11. *See also State v. Lenoir*, 2d Dist. Montgomery No. 26846, 2016-Ohio-4981, ¶ 18; *State v. Grissom*, 2d Dist. Montgomery No. 26626, 2016-Ohio-961, ¶ 17;

State v. Hatton, 4th Dist. Pickaway No. 11CA23, 2013-Ohio-475, ¶ 9.

{¶14} Ohio courts have determined that a defendant must file the motion for leave to file a delayed new trial motion within a reasonable time after the evidence is discovered. *State v. Gavin*, 2018-Ohio-536, 105 N.E.3d 373, ¶ 16 (4th Dist.); *Seal*, at ¶ 12; *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. In determining whether a defendant filed the motion for leave within a reasonable time after the evidence is discovered, Crim.R. 33(B) does not provide a time limit. However, as we noted in *Seal*, "[a]llowing 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." *Seal* at ¶ 12, citing *State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001 WL 332019, * 3-4 (Apr. 6, 2001). In *Seal*, we concluded that an unreasonable delay occurred when the defendant knew in 2013 the existence of grounds to support a delayed new trial motion, but did not file the motion until 2016. *Id.* at ¶ 13. Similarly, in the case at bar appellant's affidavit indicates that he knew of the relevant studies before 2019.

{¶15} In the case sub judice, appellant did not file his motion within 120 days of the jury's verdict. Thus, he correctly sought leave to file a delayed motion. *Seal* at ¶ 11; *Hoover-Moore* at ¶ 13, citing *Berry* at ¶ 19. In determining whether appellant established "by clear and convincing proof" that he was "unavoidably prevented" from discovering the evidence upon which he now relies, the trial court concluded that appellant could not claim evidence is undiscoverable simply because he did not sooner undertake efforts to obtain the evidence. *See State v. Anderson*, 10th Dist. No. 12AP-133, 2012-Ohio-4733, ¶ 14. The court further cited the material difference between being unaware of certain information and being unavoidably prevented from discovering that information. *Lenoir*, *supra,* at ¶ 24, citing *State v. Warwick*, 2d Dist. Champaign No. 01CA33, 2002-Ohio-3649.

{¶16} Appellant's motion in the case at bar points to scientific evidence relating to SBS/AHT and short-fall studies. Appellant contends that in 2001, the AAP published "Shaken Baby Syndrome: Rotational Cranial Injuries - Technical Report," which established a "triad of injuries associated with SBS, namely subdural hematoma, retinal hemorrhages and neurological injury." According to Dr. Galaznik, in 2009 the AAP recommended changing the name from SBS to Abusive Head Trauma and the triad no longer included retinal hemorrhages. Appellant argues that in 2010, the

year of his trial, the AAP found that retinal hemorrhages have other causes, but if extensive the only cause could be abuse. Since then, appellant contends, many studies have called SBS/AHT into question, and the most significant change is that a short fall could cause the same injuries as the victim sustained in the present case. Appellant thus argues and that this "syndrome" has wilted under further scrutiny[3].

[3] Interestingly, in 2018 multiple pediatric groups, including the American Academy of Pediatrics, addressed significant misconceptions about the diagnosis of abusive head trauma (AHT) in infants and children. *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, Pediatric Radiology, May 23, 2018. The group explained:

> "This consensus statement addresses significant misconceptions and misrepresentations about the diagnosis of abusive head trauma (AHT) in infants and young children. Major national and international professional medical societies and organizations have consistently confirmed the validity of the AHT diagnosis, its classic features and its severity. * * * in some legal AHT cases, defense arguments (frequently supported by opinion testimony provided by a small group of medical witnesses) have offered a scientific-sounding critique of the AHT diagnosis by offering a laundry list of alterative causation hypotheses. Efforts to create doubt about AHT include the deliberate mischaracterization and replacement of the complex and multifaceted diagnostic process by a near-mechanical determination based on the 'triad' - the findings of subdural hemorrhage, retinal hemorrhage and encephalopathy. This critique has been sensationalized in the mass media in an attempt to create the appearance of a 'medical controversy' where there is none."

{¶17} Dr. Galaznik also stated that "[i]f at trial it was acknowledged that a short fall might cause the constellation of findings, but not account for retinoschisis [splitting the eye's retina into two layers] without an element of abusive shaking, then such an assertion has since also been shown to be wrong. Hence if abusive shaking was presented at trial as a necessary component of the injury (particularly the retinoschisis) and if it was denied that a short distance fall, as in a stairway fall, could account for the findings in this case, the evolution of our understanding since 2009, would contradict any such testimony at the original trial." Dr. Galaznik cited various sources and further averred that the evolution in understanding short-fall head impacts has been significant since appellant's 2010 trial. Appellant argues that from 2010-2015, the AAP official position was that repetitive acceleration/deceleration was a unique and critical factor for extensive retinal hemorrhage, and the studies regarding short falls and this phenomenon did not occur until 2016.

{¶18} As the trial court observed, appellant's expert Dr. Galaznik "suggests that, at the time of trial, medical theory did not support that a short distance fall could cause injuries associated with the SBS/AHT triad and that there were no studies that showed a short distance fall could produce similar results." Notably, while Dr. Galaznik cited several retinal hemorrhage and

abusive shaking studies conducted in the years after appellant's trial as evidence of the evolution in this scientific field, Dr. Galaznik also cited several published studies prior to 2010 relating to short-distance falls. Moreover, at the trial in the case sub judice appellant's expert witness testified that the victim's injuries could have been caused by falling down stairs, as appellant argued at trial.

{¶19} Thus, appellant argues that the evolution of thought on SBS/AHT is such that it is no longer accepted. Our review does reveal that some courts have granted new trial motions based on newly discovered evidence relating to SBS/AHT. *See, e.g., State v. Edmunds*, 308 Wis.2d 374, 746 N.W.2d 590 (2007)(newly discovered evidence showed that "there has been a shift in mainstream medical opinion since the time of Edmunds's trial and Edmunds was entitled to a new trial); *People v. Miller*, No. 346321, 2020 WL 4554873 (Aug. 6, 2020) (Court of Appeals of Michigan held that scientific developments in the science relating to SBS/AHT combined with new expert support for an alternative and natural cause for child's death constitute newly discovered evidence.); *Commonwealth v. Epps,* 53 N.E.3d 1247, 474 Mass. 743 (2016)(deprivation of expert testimony that the child's injuries were not the result of shaken baby syndrome, but instead were the result of a series of short falls, constituted a substantial risk of a miscarriage of justice

necessitating new trial.) However, other courts, particularly in Ohio, have acknowledged the conflicting medical opinions, but concluded "[w]hile there are experts who disagree about SBS, it remains an accepted theory in this state and others." *State v. Milby,* 12th Dist. Warren No. CA2013-02-014, 2013-Ohio-4331, ¶ 27; *State v. Woodson*, 8th Dist. Cuyahoga No. 85727, 2005-Ohio-5691, at ¶ 49; *State v. Hendrex*, 11th Dist. Trumbull No. 2009-T-0091, 2010-Ohio-2820.

{¶20} For example, in *State v. Stein*, 5th Dist. Richland No. 13CA51, 2014-Ohio-222 the defendant argued he was entitled to a new trial because since his trial "the beliefs upon which the diagnosis of "Shaken Baby Syndrome" (SBS) once rested have been discredited." The court, however, held that Stein's "new" evidence is not newly discovered, that the vast majority of the references to medical research were published before Stein's trial and, as in the case at bar, a medical expert testified at trial that short falls could cause similar injuries. *Id.* at ¶ 30. The court thus concluded that the medical opinions of Stein's experts had been available at the time of Stein's trial and could have been discovered with the exercise of due diligence.

{¶21} Similarly, in the case sub judice we agree with the trial court's conclusion that appellant's "evidence" is not newly discovered. Appellant's affidavit states that, before the "2007-

2010 papers, the pediatric community was adamant that there was no debate in the medical community regarding SBS and abusive shaking as the direct primary cause of a unique triad of findings." However, as the trial court noted, appellant's own expert cited studies that predate appellant's trial. Further, not only did medical studies exist at the time of appellant's trial that discussed the evolution of thought on SBS/AHT, law review articles at that time also outlined the alleged controversy. *See* Lyons, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 Utah L.Rev. 1109 (2003); Gena, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions*, 2007 Wis. L.Rev. 701 (2007); Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash.U.L.Rev.1 (2009). Moreover, appellant's own trial expert opined that the victim's injuries could have resulted from a fall down the stairs. *See State v. Chambers,* 4th Dist. Adams No. 10CA902, 2011-Ohio-4352, ¶ 12.

{¶22} "Crim.R. 33(B) does not allow a defendant to wait for further evidence to arise that will bolster his case." *Seal* at ¶ 14, citing *Berry*, 10th Dist. Franklin No. 06AP-803, 2007-Ohio-2244, at ¶ 39, citing *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063, *3 (Oct. 9, 1997). Once again, we agree with the trial court's conclusion that it is unreasonable for appellant to

wait nine years after trial to request leave to file a new trial motion. Thus, the trial court's denial of appellant's motion for leave does not constitute an abuse of discretion. Appellant did not meet the criteria outlined in *Petro, supra,* to merit granting a new trial motion on the ground of newly discovered evidence. The trial court's decision is not arbitrary, unconscionable, or unreasonable. Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶23} In his second assignment of error, appellant asserts that the trial court erred by denying his motion for leave without conducting an evidentiary hearing.

{¶24} A trial court's decision whether to conduct an evidentiary hearing on a motion for leave to file a new trial motion is discretionary. *Bennett,* 4th Dist. Scioto No. 16CA3765, 2017-Ohio-574, at ¶ 12; *State v. Grissom*, 2d Dist. Montgomery No. 26626, 2016-Ohio-961, ¶ 18; *State v. Ambartsoumov,* 10th Dist. Franklin Nos. 12AP-878, 12AP-877, 12AP-889, 2013-Ohio-3011, ¶ 13, *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶ 54; *Waddy*, 10th Dist. Franklin No. 15AP-397, 2016-Ohio-4911, ¶ 20; *Hill,* 8th Dist. Cuyahoga No. 10283, 2015-Ohio-1652, ¶ 16. A criminal defendant is "only entitled to a hearing on a motion for leave to file a motion for a new trial if he submits documents

which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 7 (2d Dist.). Therefore, "no such hearing is required, and leave may be summarily denied, where neither the motion nor its supporting affidavits embody prima facie evidence of unavoidable delay." *State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893, ¶ 23.

{¶25} As we held above, in the case at bar the trial court's decision to deny appellant's motion for leave to file a new trial motion does not constitute an abuse of discretion. Consequently, we conclude that the trial court did not abuse its discretion by failing to hold an evidentiary hearing regarding the motion. Once again, while appellant may not have filed his motion for leave until nine years after his conviction, the evidence upon which he relies existed at the time of his trial.

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

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall 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 Adams 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 60 days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court 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 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said 60 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.

Smith, P.J. & Wilkin, 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.