[Cite as *State v. Unsworth*, 2010-Ohio-398.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Chuckie Thomas Unsworth

Appellant

Court of Appeals Nos. L-09-1205
L-09-1206

Trial Court Nos. CR0200301510
CR0200203515

DECISION AND JUDGMENT

Decided: February 5, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Chuckie T. Unsworth, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Chuckie T. Unsworth, appeals from a decision by the Lucas County Court of Common Pleas denying appellant's motion for new trial on the basis of newly discovered evidence. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} At the conclusion of a jury trial, appellant was found guilty of one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), and two counts of rape, in violation of R.C. 2907.02(A)(2).

{¶ 3} Evidence at the trial demonstrated the following facts. On October 11, 2002, an intruder entered the home of the victim (who was an 81-year old woman), raped her vaginally and also forced her to perform fellatio and anilingus on him. The victim identified appellant as the perpetrator at trial. Moreover, a left ring-fingerprint was recovered from the window that the intruder had used to enter the home. The fingerprint was subsequently determined to be a 14-point match with appellant's ring-finger.

{¶ 4} A rape kit was performed, and DNA in the victim's underwear was determined to be consistent with appellant's DNA. The DNA from the underwear was found to be inconsistent with all non-Caucasian males and inconsistent with 99.5 percent of all Caucasian males. Appellant is a Caucasian male.

{¶ 5} Following the jury's findings of guilt, appellant was sentenced to three consecutive ten-year terms of imprisonment.

{¶ 6} On appeal, this court affirmed the jury's verdict and the trial court's judgment. See *State v. Unsworth* (Sept. 2, 2005), 6th Dist. Nos. L-03-1189, L-04-1165. The Supreme Court of Ohio denied further review. *State v. Unsworth*, 108 Ohio St.3d 1416, 2006-Ohio-179. Appellant filed a motion to reopen his appeal, but that motion was also denied.

{¶ 7} On March 25, 2009, appellant filed a motion for leave to file a motion for a new trial on grounds that a new database existed against which the relevant DNA samples could be compared. The trial court denied the motion, and appellant now appeals from the trial court's judgment entry of July 9, 2009, raising the following assignment of error:

{¶ 8} "I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRORED [sic] IN DENYING THE APPELLANT'S 'MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL' WHEN THE EVIDENCE WAS ACCEPTED BY THE TRIAL COURT THAT APPELLANT WAS UNAVOIDABLY PREVENTED FROM DISCOVERING THE NEW EVIDENCE ON WHICH THE MOTION WAS BASED WITHIN THE TIME LIMITS SET FORTH IN CRIM.R. 33(B)."

{¶ 9} The decision to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court, and that decision will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350. The term "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary or capricious. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 10} Crim.R. 33 relevantly provides:

{¶ 11} "(A) Grounds.

{¶ 12} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶ 13} "* * *

{¶ 14} "(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial. * * *

{¶ 15} "(B) Motion for new trial; form, time.

{¶ 16} "* * *

{¶ 17} "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 the trial by jury has been waived. 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."

{¶ 18} Under Crim.R. 33(B), if a defendant fails to file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision, then he or she must seek leave from the trial court to file a "delayed motion." *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959, ¶ 20. Although Crim.R. 33(B) itself does not provide a specific 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 within a reasonable time after he discovers the evidence." Id., quoting *State v. Newell*, 8th Dist. No. 84525, 2004-Ohio-6917, at ¶ 16. If there has been an "undue delay" between the time that the evidence was discovered and the filing of the motion for new trial, the trial court must determine whether the delay was reasonable

under the circumstances or whether the defendant has adequately explained the reason for the delay. See id.

{¶ 19} In the instant case, it is undisputed that the new database, available through the National Center for Forensic Science ("NCFS"), became available in January of 2008. However, appellant did not file his motion for leave to file until March 25, 2009, more than a year later. Appellant has offered no explanation whatsoever for the greater-than-one-year lapse of time between the date that the new "evidence" became available and the filing of his motion for leave. Under the circumstances, we find that the trial court did not abuse its discretion in denying appellant's motion.

{¶ 20} Even if we were to assume that appellant's motion was timely filed, we would nevertheless find that it was properly denied. A new trial should not be granted on the basis of newly discovered evidence, unless 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. Hawkins*, 66 Ohio St.3d at 350, citing *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶ 21} In the instant case, appellant's "new evidence" purported to show that the NCFS database included individuals of Hispanic and African American descent as possible contributors of the DNA from the victim's underwear. Specifically, the NCFS

database purported to include a significantly larger number of individuals than the database used by the state's expert at trial. According to appellant's proposed evidence, the haplotype detected in the DNA extracted from the victim's underwear occurs in approximately one of every 1,261 Caucasian males.

{¶ 22} Although appellant correctly noted in his motion that the relevant haplotype is also observed in African American and Hispanic populations in the NCFS database, it is undisputed that he does not belong to those populations. In addition, the number of individuals in those populations carrying the relevant haplotype is minuscule – with an occurrence of one in 2,398 African Americans and one in 2,260 Hispanics.

{¶ 23} Most compellingly, the overall NCFS results -- which show that one in 1,739 individuals carries the relevant haplotype -- do not favor appellant, whether compared to the state's expert's total for Caucasians alone, which was 1 in 517 Caucasians, or to the overall total of the individuals included in the state's expert's database, which included a total of 1,297 individuals (comprised of 535 African Americans, 517 Caucasians, and 245 Hispanics).

{¶ 24} So too, the NCFS database shows that the presence of the relevant haplotype in Caucasian males is even more rare than it was revealed to be in the state's expert's database, with the NCFS database showing an occurrence of one in 1,261 individuals and the state's expert's database showing an occurrence of one in 517 individuals.

{¶ 25} Thus, the NCFS database evidence in no way demonstrates a "strong probability" of a different result if a new trial is granted and, as such, was insufficient to support a motion for a new trial.[1] See *State v. Hawkins*, supra.

{¶ 26} Viewed in a light most favorable to appellant, the new "evidence" merely shows: (1) that a new database exists, which contains a larger population than did the state's expert's database for comparisons of the relevant haplotype to determine the frequency with which it occurs in the population; and (2) the haplotype that was detected in the DNA extracted from the victim's underwear is sometimes present in individuals of Hispanic or African American descent. At best, such evidence had the potential only to impeach the state's expert's testimony that the profile was not observed in its database of individuals of Hispanic or African American descent. As such, the "evidence" is insufficient to support a motion for a new trial. See *State v. Hawkins*, supra. Appellant's sole assignment of error is not well-taken.

{¶ 27} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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[1]The unavailing nature of NCFS database evidence is all the more obvious when considered in light of the other evidence presented at trial, including the victim's identification of appellant and, especially, the 14-point match of appellant's fingerprint to the fingerprint found at the point of entry in the victim's house.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE