[Cite as *State v. Peals*, 2010-Ohio-5893.]

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

State of Ohio — Court of Appeals No. L-10-1035

Appellee — Trial Court No. CR0200203437

v.

Earnest Lorenzo Peals — **DECISION AND JUDGMENT**

Appellant — Decided: December 3, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

COSME, J.

{¶ 1} This appeal arises from the trial court's dismissal of appellant's delayed motion for a new trial on charges of aggravated murder and kidnapping, which was

accompanied by affidavits in which two of the state's witnesses recanted their trial testimony that appellant had shot the victim. Appellant claims that the trial court abused its discretion in dismissing the motion without a hearing and that his trial counsel was ineffective for failing to explain to the court why the affidavits were not obtained until six years after the verdict was rendered. For the reasons that follow, we affirm the judgment of the Lucas County Court of Common Pleas.

I. BACKGROUND

{¶ 2} On November 19, 2003, appellant, Earnest Lorenzo Peals, was found guilty by the Lucas County Court of Common Pleas of aggravated murder and kidnapping and sentenced to life imprisonment with the possibility of parole after 23 years. At trial, the state presented evidence that the victim, L.C. Pittman, had been shot a total of eight times, including four times in the head, with two different caliber weapons, a .22 revolver and a .380 handgun. As relevant here, the state adduced testimony from co-defendants Michael Peals, Kevin Jordan, and Dario Williamson, who all testified pursuant to cooperation agreements with the state that appellant shot Mr. Pittman two or three times in the head with the .380 handgun after Michael Peals had shot him several times with the .22 revolver. Finding that the trial court's verdict was not against the manifest weight of the evidence, this court affirmed the trial court's decision in *State v. Peals*, 6th Dist. No. L-03-1355, 2006-Ohio-591.

{¶ 3} Approximately six years later, on August 26, 2009, appellant filed a "Motion for New Trial Date." Attached to appellant's motion were the affidavits of Michael Peals, dated June 15, 2009, and Dario Williamson, dated June 22, 2009, in which they recanted their trial testimony and attested that Michael Peals alone shot Mr. Pittman eight times with the two different weapons. As revised, the testimony of these witnesses now corresponds to appellant's version of the events that his brother Michael had shot Pittman first with his own .22 revolver, then disarmed appellant of his .380 handgun and shot Pittman with that weapon as well.

{¶ 4} On November 2, 2009, appellee moved to dismiss appellant's motion for a new trial on grounds that it failed to satisfy the requirements of Crim.R. 33(B). Appellee argued that since appellant's motion for new trial was filed more than 120 days after the verdict was rendered, he must first obtain leave from the court to file his motion and demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the evidence within the 120-day period.

{¶ 5} On November 6, 2009, appellant responded to appellee's motion to dismiss by submitting an affidavit from his attorney, which stated, "I received this information almost six years after the trial verdict. These affidavits [from Michael Peals and Dario Williamson] were not solicited by me and I did not prepare the affidavits." On November 12, 2009, appellee filed a supplemental memorandum, arguing that the affidavit of appellant's attorney is inadequate for purposes of Crim.R. 33(B) because it

does not explain how the recantations came to light, when they were first known to appellant, or why there was such a long delay in obtaining the information.

{¶ 6} On January 13, 2010, the trial court journalized its order granting appellee's motion to dismiss, finding that appellant had "failed to show by clear and convincing proof that this information could not have been discovered in the exercise of reasonable diligence within one hundred twenty days of the date of the verdict." The cause is now before this court upon appeal from that judgment.

II. UNAVOIDABLE DELAY

{¶ 7} In his first assignment of error, appellant maintains:

{¶ 8} "The trial court abused its discretion by dismissing Appellant's motion for a new trial without a hearing."

{¶ 9} Appellant argues that the affidavits attached to his motion "were not solicited by trial counsel, they were spontaneously sent to him by Michael Peals and Williamson." He contends that recanted testimony is "implicitly" undiscoverable until such time as the witness decides to "do the right thing." Thus, appellant asserts, the trial court should have held an evidentiary hearing "on the merits to allow Peals to further develop the record" or at least to "address why [the recantations] hadn't been available during trial."

{¶ 10} We emphasize at the outset that the merits of appellant's motion for new trial are not before us. We are not concerned, therefore, with questions of whether the

new testimony submitted by appellant is credible or would materially affect the outcome of the trial. See *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, ¶ 20; *State v. Velez*, 9th Dist. No. 09CA009564, 2010-Ohio-312, ¶ 13. The sole question raised in this appeal is whether the trial court abused its discretion in dismissing appellant's motion without a hearing on grounds that it was untimely filed.

{¶ 11} Crim.R. 33 provides:

{¶ 12} "**(A) Grounds**

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

{¶ 14} "* * *

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

{¶ 16} "**(B) Motion for new trial; form, time**

{¶ 17} "* * *

{¶ 18} "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. 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."

{¶ 19} Pursuant to Crim.R. 33 (B), a defendant who wishes to file a motion for new trial on account of newly discovered evidence beyond 120 days of the jury's verdict or the court's decision "must seek leave from the trial court to file a 'delayed motion.'" *State v. Unsworth*, 6th Dist. Nos. L-09-1205, L-09-1206, 2010-Ohio-398, ¶ 18; *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959, ¶ 20. As explained by the court in *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶ 16:

{¶ 20} "'In order to be able to file a motion for a new trial based on newly discovered evidence beyond the one hundred and twenty days prescribed in the above rule, a petitioner must first file a motion for leave, showing by "clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion."' *State v. Morgan*, Shelby App. No. 17-05-26, 2006-Ohio-145, 2006 WL 93108. '[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 for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.' *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146, 19 OBR 230, 483 N.E.2d 859."

{¶ 21} A trial court may not, therefore, "consider the merits of the motion for a new trial until it makes a finding of unavoidable delay." *State v. Lanier*, 2d Dist. No. 2009 CA 84, 2010-Ohio-2921, ¶ 17. In other words, "unless a trial court has granted a defendant leave to file a delayed motion for new trial, the motion for a new trial is not properly before the court." *State v. Clumm*, 4th Dist. No. 08CA32, 2010-Ohio-342, ¶ 26. See, also, *State v. Dawson* (2000), 89 Ohio St.3d 1208 (Lundberg Stratton, J., concurring in court's sua sponte dismissal of certified conflict).

{¶ 22} Most courts, including this court, also require defendants to file a motion for leave within a reasonable time after discovering the evidence. *State v. Grinnell*, 10th Dist. No. 09AP-1048, 2010-Ohio-1048, ¶ 12; *State v. Unsworth*, supra, 2010-Ohio-398, ¶ 18; *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, ¶ 24; *State v. Willis*, supra, 2007-Ohio-3959, ¶ 20; *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 37.

{¶ 23} The decision whether to grant or hold an evidentiary hearing on a defendant's request for leave to file a delayed motion for new trial falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶ 54; *State v. Bush*, 10th Dist. No. 08AP-627, 2009-Ohio-441, ¶ 9; *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 19; *State v. Gray* (Apr. 13, 1995), 8th Dist. No. 67574. Courts generally hold that a defendant is entitled to an evidentiary hearing on the issue of unavoidable delay where the defendant's motion for leave includes "'documents that on

their face support his claim that he was unavoidably prevented from timely discovering the evidence' at issue." *State v. McConnell*, at ¶ 19, quoting *State v. York* (Feb. 8, 2000), 2d Dist. No. 99-CA-54. However, 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. Lanier*, supra, 2010-Ohio-2921, ¶ 22; *State v. Clumm*, supra, 2010-Ohio-342, ¶ 28; *State v. Bush*, supra, 2009-Ohio-441, ¶ 12; *State v. Parker*, supra, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶ 21; *State v. Norman*, 10th Dist. No. 04AP-1312, 2005-Ohio-5087, ¶ 9.

{¶ 24} In this case, appellant never requested leave to file a delayed motion for new trial. He merely filed a motion for new trial accompanied by the recanting affidavits of Michael Peals and Williamson, without offering any evidence or argument in regard to the issue of unavoidable delay. Nothing in those affidavits explains when or why the affiants decided to recant their trial testimony, whether appellant played a role in that decision, or whether and at what point appellant learned of their willingness to come forward with the new testimony. As succinctly stated by appellant himself, "We have nothing but two affidavits, and no context to place them in * * *."

{¶ 25} Appellant seems to argue that the dates of the recanting affidavits are themselves prima facie evidence of unavoidable delay, since they were spontaneously sent to his trial counsel by Michael Peals and Williamson. Appellant's assertion that the affidavits were forwarded by the witnesses themselves is belied, however, by the

envelope in which the affidavits were mailed. That envelope bears a return address with appellant's name and inmate designation at the Toledo Correctional Institution, which indicates that the affidavits were in fact secured by, or at least given to, appellant, who then sent them on to his trial attorney. Moreover, even if Michael Peals and Williamson had sent their affidavits directly to appellant's counsel, it has been squarely held that "the use of an affidavit signed outside of the time limit [under Crim.R. 33 (B)] that fails to offer any reason why it could not have been obtained sooner is not adequate to show by clear and convincing proof that the evidence could not have been obtained within the prescribed time period." *State v. Franklin*, 7th Dist. No. 09 MA 96, 2010-Ohio-4317, ¶ 20. There is simply no information in appellant's initial motion that would allow for a conclusion of unavoidable delay.

{¶ 26} Appellant was given ample opportunity to provide such information to the trial court after the state pointed out its motion to dismiss that appellant had failed to address the issue of unavoidable delay. In response to the state's motion to dismiss, however, appellant did not attempt to provide any meaningful information in regard to the circumstances of the recantations or otherwise explain how they came to light. Appellant did not submit supplemental affidavits of the witnesses in regard to the issue of unavoidable delay, did not file an affidavit of his own claiming lack of prior knowledge of the recantations or otherwise explaining when or how he first acquired knowledge that the witnesses would come forward with their new testimony, and never requested a

hearing on the issue of unavoidable delay. Instead, appellant was content to rest upon the affidavit of his trial attorney, which attested only to the fact that *counsel* had not solicited the recantations or received them until six years after the trial verdict. Indeed, although the recanting affidavits are dated over two months before they were filed with the trial court and approximately five months before appellant responded to the state's motion to dismiss, the affidavit of appellant's trial counsel does not disclose whether he had spoken with the recanting witnesses or appellant in the interim with respect to the issue of unavoidable delay.

{¶ 27} Under these circumstances, we cannot say that the trial court abused its discretion in dismissing appellant's motion for new trial without holding a hearing on the issue of unavoidable delay. Cf. *State v. Diaz* (Oct. 16, 1984), 10th Dist. No. 83AP-1102 ("we cannot find that the trial court erred in not conducting an evidentiary hearing since none was specifically requested, and counsel did not offer evidence when afforded an opportunity to support his motion, and counsel did not object when the trial court proceeded to rule on the motion without receiving evidence").

{¶ 28} Accordingly, appellant's first assignment of error is not well-taken.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 29} In his second assignment of error, appellant asserts:

{¶ 30} "Trial counsel provided ineffective assistance of counsel by his repeated failure to address the requirement that Appellant establish the evidence could not have reasonably been discovered during trial."

{¶ 31} Appellant is claiming ineffective assistance of counsel because both his initial delayed motion for new trial and his response to the state's motion to dismiss failed to include sufficient evidence or documentation to support a finding of unavoidable delay. According to appellant, "Counsel should have spoken with the affiants to determine why they prepared the affidavits and sent them to him. * * * It was incumbent [on counsel] to make some showing as to * * * why this evidence [of the witnesses' untruthful trial testimony] lay dormant for 6 years."

{¶ 32} It may or may not be the case that appellant's trial counsel failed to sufficiently investigate the matter and that such an investigation would have uncovered sufficient evidence to support a claim of unavoidable delay. However, the present record does not contain any evidence on these issues and, in the absence of such evidence, it is impossible for us to determine whether counsel was prejudicially ineffective in his representation of appellant. Thus, appellant's claim of ineffective assistance of counsel cannot be considered on this appeal because it is based on evidence dehors the record. *State v. Taylor*, 6th Dist. No. H-08-026, 2009-Ohio-6496, ¶ 32; *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 39; *State v. Davis*, 6th Dist. No. L-05-1056, 2006-Ohio-2350, ¶ 21. See, also, *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228.

{¶ 33} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶ 34} 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.

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

Keila D. Cosme, J. _____
CONCUR.
JUDGE