[Cite as *State v. Graggs*, 2015-Ohio-3990.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 15AP-480 (C.P.C. No. 08CR-02-1098)
v.	:	(ACCELERATED CALENDAR)
John Q. Graggs,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2015

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

John Q. Graggs, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} John Q. Graggs, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion for new trial.

{¶ 2} Appellant was previously found guilty, pursuant to a jury trial, of aggravated robbery, a first-degree felony and violation of R.C. 2911.01; kidnapping, a first-degree felony and violation of R.C. 2905.11; and aggravated murder, an unspecified felony and violation of R.C. 2903.01. The trial court sentenced appellant to life imprisonment without parole. This court affirmed his conviction in *State v. Graggs*, 10th Dist. No. 09AP-339, 2009-Ohio-5975 ("*Graggs I*"). The convictions stemmed from the January 2008 death of a man named Fred Brock in an apartment owned by Marcus Jones. Brock had apparently been guarding a large amount of cocaine in Jones's apartment for Jones

and Jessie Lanier, both of whom were drug dealers. Jones had left Brock and Lanier in the home the night of the murder, but then later saw Lanier at a local high school basketball game. Sometime after the game, Jones received a telephone call from Lanier, telling Jones to come to the apartment. Jones arrived outside the apartment with another friend, and Lanier arrived about two minutes later. They entered the apartment and found Brock on the floor, handcuffed and shot. Jones and Lanier cleared the apartment of drug paraphernalia and cash and eventually called police. Lanier was killed in an unrelated murder prior to appellant's trial.

{¶ 3} On November 10, 2009, appellant filed in the trial court a petition for post-conviction relief. On February 16, 2010, the trial court dismissed the petition without a hearing. We affirmed the trial court's judgment in *State v. Graggs*, 10th Dist. No. 10AP-249, 2010-Ohio-5716 ("*Graggs II*").

{¶ 4} On August 8, 2013, appellant filed a motion for leave to file a motion for new trial based on newly discovered evidence pursuant to Crim.R. 33. The trial court denied appellant's motion for leave to file a motion for new trial, and we affirmed the trial court's decision in *State v. Graggs*, 10th Dist. No. 13AP-852, 2014-Ohio-1195 ("*Graggs III*").

{¶ 5} On March 24, 2015, appellant filed the current motion for leave to file a motion for new trial based upon newly discovered evidence. Appellant's newly discovered evidence was in the form of an affidavit from another Ohio prison inmate, Jamal Sealy. Sealy averred that, in June 2008, Lanier confided in him that he killed Brock. Sealy claimed in the affidavit that he did not discover appellant had been convicted of murdering Brock until October 2014. The trial court denied the motion for leave to file a motion for new trial without an evidentiary hearing. Appellant appeals the judgment, asserting the following assignments of error:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION FINDING THAT THE APPELLANT WAS NOT UNAVOIDABLY PREVENTED FROM DISCOVERING THE NEW EVIDENCE THAT WAS THE BASIS OF HIS MOTION FOR LEAVE TO FILE A MOTION FOR A NEW TRIAL.
>
> [II.] THE TRIAL COURT [ABUSED] IT[S] DISCRETION FINDING THAT THE NEW EVIDENCE DOES NOT

> CONVEY A STRONG PROBABILITY OF CHANGING THE RESULT IF A NEW TRIAL IS GRANTED.
>
> [III.] THE TRIAL COURT ABUSED IT[S] DISCRETION WHEN IT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE IF IN FACT APPELLANT WAS UNAVOIDABLY PREVENTED FROM DISCOVERING THE NEW EVIDENCE.

{¶ 6} We will address appellant's assignments of error together. Appellant argues in his assignments of error that the trial court erred when it found that he was not unavoidably prevented from discovering the new evidence, found that the new evidence does not convey a strong probability of changing the result if a new trial is granted, and failed to conduct an evidentiary hearing to determine if, in fact, appellant was unavoidably prevented from discovering the new evidence.

{¶ 7} Crim.R. 33(B) provides:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.
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> 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.

{¶ 8} Thus, Crim.R. 33 contemplates a two-step procedure when a defendant seeks to file a motion for new trial more than 120 days after the conclusion of the trial. *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3837, ¶ 13. Under the first step, the defendant must demonstrate that he was unavoidably prevented from discovering the

evidence relied upon to support the motion for new trial. *Id*. A defendant is "unavoidably prevented" from discovering the new evidence within the time period for filing a motion for new trial when the defendant "had no knowledge of the evidence supporting the motion for new trial and could not have learned of the existence of the evidence within the time prescribed for filing such a motion through the exercise of reasonable diligence." *Id*., citing *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244. Under the second step, "if the defendant does establish by clear and convincing evidence that the delay in finding the new evidence was unavoidable, the defendant must file the motion for new trial within seven days from that finding." *Id*.

{¶ 9} A motion for new trial, pursuant to Crim.R. 33, is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71 (1990), paragraph one of the syllabus. It is also within the discretion of the trial court to determine whether a motion for a new trial and the material submitted with the motion warrants an evidentiary hearing. *State v. Hill*, 64 Ohio St.3d 313, 333 (1992). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} To warrant the granting of a motion for new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown 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. Petro*, 148 Ohio St. 505 (1947), syllabus.

{¶ 11} In the present case, appellant's motion for new trial was based upon the affidavit of Sealy. In the affidavit, Sealy claimed that Lanier had asked him in June 2008 to store large amounts of cocaine and money at his house. When Sealy told Lanier that he did not want to end up dead like Brock, Lanier told him that he did not need to worry because he was the person who killed Brock. Lanier told him that Brock had been stealing drugs from him, and he only meant to scare Brock, but his gun accidentally fired. Lanier told Sealy that he got scared and tried to shoot Brock again, but his gun jammed, so he

used another gun to shoot Brock two more times. Sealy averred that he did not know that appellant had been convicted of the murder until October 2014, when he read an article in an April 1, 2014 Columbus Daily Reporter newspaper. Sealy claimed he wrote to the Franklin County Prosecutor's Office sometime in late November 2014 to give them the information, but he never received a reply. In December 2014, Sealy conducted some research and discovered that Graggs was in the same prison as he was, so he met with Graggs and told him what Lanier had said.

{¶ 12} The trial court here addressed both the merits of appellant's motion for leave to file his motion for new trial and also the underlying merits of the argument in favor of a new trial, which this court found in *Graggs III* to be permissible. *See id.* at ¶ 9. With regard to appellant's motion for leave to file a motion for new trial, the trial court concluded that Lanier's involvement in drug dealing from the apartment in which Brock was murdered had been obvious from the beginning, and the factual record from the trial and all of appellant's appeals set out Lanier's involvement. The trial court found that, although it was unclear whether appellant's counsel interviewed Lanier prior to trial and before he was murdered, the State of Ohio, plaintiff-appellee, identified Lanier during discovery in May 2008, and appellant had every opportunity to develop Lanier's role. With regard to the merits of the underlying motion for new trial, the trial court found that Sealy's affidavit did not convey a strong probability of changing the result at trial, even if a new trial were granted. The trial court determined that Lanier's alleged confession to Sealy was hearsay, and it was unlikely Sealy would be permitted to testify regarding such statement. The trial court also found that Sealy's statement does not dispel the possibility that appellant was still involved in Brock's murder as an aider and abettor, as the jury apparently believed because it acquitted him of the firearm specifications.

{¶ 13} However, even if we were to find, assuming arguendo, that appellant was unavoidably prevented from discovering the new evidence about Lanier earlier, as appellant argues in his first assignment of error, appellant's motion would fail because the new evidence does not disclose a strong probability that it would change the result if a new trial were granted. Initially, Sealy has no evidence to offer on Lanier's alleged involvement in Brock's murder outside of his own testimony. That Sealy's testimony, which is unrebuttable by the now deceased Lanier, would convince a jury of Lanier's sole

involvement in the crime is highly unlikely. Sealy's testimony does nothing to exonerate appellant as an aider and abettor, which the jury apparently believed appellant to be. Both Sealy's averments and appellant's arguments in his brief completely ignore the incriminatory evidence produced at trial that convincingly demonstrated appellant was involved in Brock's murder. As we explained in *Graggs I*, appellant told detectives during questioning that he had never been to the apartment complex in question and had not seen Brock for ten years, *id*. at ¶ 25; however, the DNA on the tip of a latex glove found near Brock's body matched appellant's DNA. *Id*. at ¶ 18. The glove tip from the scene was also determined to be similar to the glove found at appellant's residence. *Id*. at ¶ 9. Furthermore, phone records established that calls from appellant's cell phone were made in the vicinity of Jones's apartment around the time of the shooting. *Id*. According to phone records, appellant made three calls between 7:42 and 7:43 p.m. on the night of the murder in the vicinity of a cell tower one-half mile from Jones's apartment. *Id*. at ¶ 11. At approximately 8:50 p.m. that same day, appellant made two calls in the vicinity of a cell tower near his home. *Id*.

{¶ 14} Additionally, Jones testified that $35,000 in cash was missing from the apartment after Brock's murder. *Id.* at ¶ 25. On the day after the murder, appellant paid $480.35 in cash for a pair of diamond earrings at a jewelry store. *Id*. at ¶ 10. He returned to the same jewelry store the same day and paid $4,771.69 in cash for an anniversary ring. *Id*. Six days after the murder, appellant made a lump-sum payment of $2,900 on the loan for his Cadillac. As we explained in *Graggs I*, there was testimony that, as of January 8, 2008, appellant was working full-time and making $16.26 per hour netting $443.73 on January 4 and $495.76 on January 11, 2008, and appellant had made only erratic payments on his car loan during 2007.

{¶ 15} Therefore, even if we were to assume arguendo that appellant was unavoidably prevented from discovering Sealy's information within the time prescribed for filing a motion for new trial through the exercise of reasonable diligence, we agree with the trial court that appellant's motion would fail because Sealy's affidavit does not disclose a strong probability that it would change the result if a new trial was granted. Sealy's affidavit does nothing to prevent a conclusion that appellant was an aider and abettor, as the jury found, and fails to rebut any of the evidence this court relied on in *Graggs I* in

finding the trial court's judgment was not based on insufficient evidence nor against the manifest weight of the evidence. Thus, we overrule appellant's second assignment of error. Furthermore, having come to the conclusion that appellant's motion for new trial would fail on the merits even if he had been unavoidably prevented from discovering Sealy's information regarding Lanier, we find that appellant's first and third assignments of error are moot for purposes of appeal.

{¶ 16} Accordingly, appellant's first and third assignments of error are moot, his second assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and BRUNNER, JJ., concur.

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