

[Cite as *State v. Gray*, 2003-Ohio-6643.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 82841

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee | : | JOURNAL ENTRY |
| vs. | : | AND |
| RICARDO GRAY, | : | OPINION |
| Defendant-Appellant | : | |
| | : | |
| DATE OF ANNOUNCEMENT OF DECISION | : | DECEMBER 11, 2003 |
| | : | |
| CHARACTER OF PROCEEDING | : | Criminal appeal from Common Pleas Court Case No. CR-369837 |
| JUDGMENT | : | AFFIRMED |
| DATE OF JOURNALIZATION | : | |

APPEARANCES:

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| For Plaintiff-Appellee: | WILLIAM D. MASON Cuyahoga County Prosecutor KRISTEN LUSNIA Assistant County Prosecutor Justice Center 1200 Ontario Street Cleveland, Ohio 44113 |
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| For Defendant-Appellant: | PAUL MANCINO, JR. 75 Public Square-Suite 1016 |
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ANNE L. KILBANE, J.

{¶1} This is an appeal from an order of Judge Nancy R. McDonnell that denied Ricardo Gray's motion for a new trial or, in the alternative, for postconviction relief. Gray contends he was entitled to a hearing on his motion for a new trial because of new information and that, in light of a new interpretation of law, he was denied his due process rights when his petition for postconviction relief was denied. We affirm.

{¶2} From the record we glean the following: In November of 1998, Gray was indicted on one count of aggravated murder with a firearm specification, and two counts of attempted aggravated murder, both with firearm specifications, one count of attempted aggravated murder was later dismissed because the victim could not be identified. Following a jury trial, he was convicted on count one of the lesser included offense of murder with a firearm specification, and on count two of the lesser included offense of felonious assault, also with a firearm specification. He was sentenced to fifteen years to life on the murder charge, five years on the felonious assault charge, and three years on the firearm specifications, sentences to be served consecutively.

{¶3} Gray appealed ("Gray I"), this court affirmed his

convictions,¹ and the Ohio Supreme Court declined further review.² He then moved to reopen his appeal ("*Gray II*") because of his appellate lawyer's failure to raise certain arguments. This court allowed this reopening, but only on the limited issue of consecutive sentences.³ Gray again appealed to the Ohio Supreme Court on the partial denial of his motion to reopen, and the Supreme Court again declined review.⁴

{¶4} This court then vacated his sentence and remanded the case for re-sentencing in *Gray III*.⁵ Upon remand, the judge imposed the same sentence, Gray again appealed, ("*Gray IV*") and we again vacated his sentence and remanded.⁶ Following the second remand, Gray moved for a new trial, citing newly discovered evidence, or, in the alternative, a petition for postconviction relief.⁷ The judge denied his motions, and Gray again appealed asserting two assignments of error, set forth in Appendix A.

¹*State v. Gray* (July 27, 2000), Cuyahoga App. No. 76170.

²*State v. Gray*, Cuyahoga App. No. 76170, dismissal sua sponte (Nov. 22, 2000), Sup. Ct. No. 00-1630.

³*State v. Gray* (Sept. 17, 2001), Cuyahoga App. No. 76170, application granted in part and denied in part.

⁴*State v. Gray*, Cuyahoga App. No. 76170, dismissal sua sponte (Dec. 19, 2001), Sup. Ct. No. 01-1871.

⁵*State v. Gray* (Mar. 14, 2002), Cuyahoga App. No. 76170, vacated and remanded for re-sentencing.

⁶*State v. Gray* (Jan. 30, 2003), Cuyahoga App. No. 81474, vacated and remanded for re-sentencing.

⁷The docket does not reflect that Gray has been re-sentenced as required in *Gray IV*.

NEED FOR A HEARING

{¶5} Although Gray asserts that he is entitled to a hearing on his motion(s), his petition is untimely under both the postconviction relief statute, R.C. 2953.21, and Crim.R. 33(B) governing motions for a new trial,.

{¶6} R.C. 2953.21(A)(2) states,

"A petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after [*5] the expiration of the time for filing the appeal."

{¶7} Crim.R. 33(B) provides in pertinent part:

"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} This court held in *State v. Keenan*⁸, the exception stated in Crim.R. 33(B) for evidence that a defendant was "unavoidably prevented" from timely presenting is consistent with the standard for untimely postconviction relief petitions stated in R.C. 2953.23, which provides:

"(A) Whether a hearing is or is not held on a petition filed pursuant to

⁸*State v. Keenan* (Feb. 1, 2001), Cuyahoga App. No. 77480.

section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a [*6] second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:(1) Either of the following applies:

The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.(b) Subsequent to the period prescribed in division (A) (2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence."

{¶9} Gray's newly discovered evidence comes in the form of two affidavits from witnesses who testified at trial: Anthony Mixon and Arthur Jackson, Sr., who were cross-examined by Gray's lawyer and who asserted throughout the trial that Gray was the shooter. Each now asserts he was coerced into identifying Gray as the shooter; Mixon, on parole at the time of the shooting, claims to have been coerced by the police to avoid going back to prison, and Jackson by "the Kinsman boys" out of personal fear, but for what reason he does not explain.

{¶10} Recantations of prior testimony are to be examined with utmost suspicion.⁹ "Recantation by a significant witness does not, as a matter of law, entitle the defendant to a new trial. This

⁹*State v. Germany* (Sept. 30, 1993), Cuyahoga App. No. 63568, citing *United States v. Lewis* (C.A.6, 1964), 338 F.2d 137, 139.

determination is left to the sound discretion of the trial court.”¹⁰

{¶11} For a new trial to be granted, the moving party must show that the evidence now presented is material, and had this evidence been available at trial, there is a strong possibility that the trial would have produced a different result.¹¹ Not only has Gray failed to follow the time limitations imposed by Crim.R. 33 and R.C. 2953.21 by seeking this relief over two years after his convictions, he also failed to provide proof that his “newly discovered evidence” would have provided a different result at trial.

{¶12} In addition, he did not follow the correct procedural guidelines for submitting newly discovered evidence. He should have filed for leave to file a delayed motion for new trial, demonstrating in this initial filing why he was prevented from ascertaining the evidence that is the grounds for the new trial motion. “From the language of the rule, it is clear that a two step process is anticipated when the motion is made outside the period during which motions for a new trial are permitted as a matter of course.”¹²

{¶13} Gray contends that this court’s decision in *State v.*

¹⁰*State v. Walker* (1995), 101 Ohio App.3d 433, 435, 655 N.E.2d 823, citing *State v. Lane* (1976), 49 Ohio St.2d 77, 358 N.E.2d 1081, 5 O.O. 45.

¹¹*State v. King* (1989), 63 Ohio App.3d 183, 578 N.E.2d 501.

¹²*State v. Dawson* (July 14, 1999), Medina App. No. 19179.

*Swortcheck*¹³ supports the proposition that he was automatically entitled to a hearing in light of the new information presented by Jackson and Mixon. We held, "when determining whether there are substantive grounds for postconviction relief that would warrant a hearing, the affidavits in support of the petition should be accepted as true."¹⁴ *Swortcheck*, however, involved a claim of ineffective assistance of counsel under the particular facts of the case. "*Swortcheck* was not intended to blindly provide a blanket requirement that all affidavits should be accepted as true."¹⁵

{¶14} Accordingly, the judge does not have to accept as true any of the affidavits submitted in a petition for postconviction relief, but may weigh their credibility.¹⁶ The first assignment of error lacks merit.

CLARIFICATION OF THE CRIME OF FELONIOUS ASSAULT.

{¶15} Because of the Ohio Supreme Court's decision in *State v. Barnes*,¹⁷ which held that felonious assault was not a lesser included offense of either attempted aggravated murder or aggravated murder, Gray contends his convictions cannot stand.

{¶16} Although we agree that *Barnes* applies retroactively, as does any decision of the Ohio Supreme Court that does not specify

¹³(1995), 101 Ohio App.3d 770, 656 N.E.2d 732.

¹⁴Id. at 772.

¹⁵*State v. Caldwell* (Sept. 10, 1998), Cuyahoga App. No. 73748.

¹⁶*State v. Saylor* (1998), 125 Ohio App.3d 636, 709 N.E.2d 231.

that it is "prospective only,"¹⁸ such retroactive application applies only to those cases where the direct appeal is still pending. Gray was convicted in February of 1999, and his conviction was affirmed in his direct appeal in July of 2000. He may not now assert a charge of an erroneous conviction over three years after his direct appeal was resolved.

{¶17} The United States Supreme Court and this court have consistently followed the doctrine outlined in *United States v. The Schooner Peggy*¹⁹, which held:

"* * * if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, * the court must decide according to existing law, and if it be necessary to set aside a judgment *** which cannot be affirmed, but in violating the law, the judgment must be set aside."**

{¶18} In *State v. Jenkins*²⁰, this court addressed the issue of retroactivity, holding that there are no exceptions to retroactivity when defendants have exhausted their direct appeals. We followed the rationale of *Griffith v. Kentucky*,²¹ which stated:

"We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

¹⁷(2002), 94 Ohio St.3d 21, 25-27, 759 N.E.2d 1240, 1245-1247.

¹⁸*State ex rel Bosch v. Indus. Comm.* (1982), 1 Ohio St.3d 94, 438 N.E.2d 415.

¹⁹(1801), 5 U.S. (Cranch) 103, 2 L.Ed.49.

²⁰(1987), 42 Ohio App.3d 97, 536 N.E.2d 667.

²¹*Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649.

cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past."

{¶19} *Barnes* need only be applied to cases where defendants have not exhausted their direct appeals and is therefore not applicable here.

{¶20} To maintain the finality of its decisions, the Ohio Supreme Court has refused to extend retroactive application of a new law beyond pending, direct appeals.²² When Gray was convicted, felonious assault was a lesser included offense of attempted murder, and it was correct to give the jury the felonious assault instruction. The jury decided that the evidence was not sufficient to convict on the attempted murder charges, but did determine that the evidence was sufficient to prove the felonious assault, and Gray's 1999 convictions were valid at the time.

{¶21} Had the *Barnes* decision been in effect in 1999, it would have been error to give the jury a lesser included offense instruction and, in turn, error for the jury to convict Gray of an offense for which he was not charged. The second assignment lacks merit.

{¶22} The judgment is affirmed.

Judgment affirmed.

²²*State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131.

APPENDIX A- ASSIGNMENTS OF ERROR

"I. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT DENIED HIS MOTION FOR A NEW TRIAL WITHOUT AN EVIDENTIARY HEARING."

"II. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED DEFENDANT'S PETITION FOR Postconviction RELIEF BASED ON A NEW INTERPRETATION OF TH [SIC] LAW BY THE OHIO SUPREME COURT."

It is ordered that appellee recover of appellant 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 Cuyahoga County Common Pleas Court to carry this judgment into execution.

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

DIANE KARPINSKI, J., CONCURS

MICHAEL J. CORRIGAN, P.J., CONCURS IN JUDGMENT ONLY

ANNE L. KILBANE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).