[Cite as *State v. Greene*, 2009-Ohio-6307.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92638

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK GREENE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498746

BEFORE: Stewart, P.J., Dyke, J., and Celebrezze, J.

RELEASED: December 3, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Mark Greene, appeals from an order denying his motion for a new trial. He premised the motion for a new trial on "newly discovered evidence" involving a codefendant who, among other counts, agreed to plead guilty to attempted murder and testify against Greene. However, the court dismissed the attempted murder count subsequent to Greene's trial, a fact that Greene now insists that his jury should have heard because this dismissal affected the codefendant's credibility. We find no error and affirm.

{¶ 2} The indictment charged both Greene and his codefendant, Seth Green (we will refer to him as "codefendant"), with attempted murder and two counts of felonious assault. The counts contained one-, three-, and five-year firearm specifications. Although there is no transcript of the trial testimony, the parties agree that the codefendant pleaded guilty to attempted murder and agreed to testify against Greene on behalf of the state. The codefendant apparently told the jury that he had agreed to testify in exchange for a prison sentence of between eight and 18 years. At the conclusion of the case, the court granted Greene's Crim.R. 29(A) motion for judgment of acquittal on the attempted murder count. Greene was then found guilty of the remaining counts and sentenced to a total of 16 years in prison: eight years for felonious assault to be served consecutive to separate three- and five-year terms for the firearm specifications.

{¶ 3} The court sentenced the codefendant after Greene's sentencing. Again, there is no record of that sentencing, but the parties agree that the codefendant asked the court to dismiss the attempted murder count given the court's judgment of acquittal on that same count in Greene's case. The court dismissed the attempted murder count and sentenced the codefendant to 11 years in prison: three years for felonious assault to be served consecutive to separate, consecutive three- and five-year terms on the firearm specifications.

{¶ 4} Greene then filed his motion for a new trial, arguing that the codefendant's acquittal on the attempted murder counts constituted newly discovered evidence because "the jury was not informed of this change of direction and it only came to light after the trial in this case."

{¶ 5} We can summarily overrule Greene's assignment of error because he has not exemplified his claimed error as required by App.R. 16(A)(7). Greene only included the transcript of his sentencing — he did not include any trial testimony from which we could verify representations made about the codefendant's testimony. See *State v. Puckett*, 143 Ohio App.3d 132, 135, 2001-Ohio-2463.

{¶ 6} But even if we consider Greene's assignment based on the uncontested representations made by both parties, he cannot prevail.

{¶ 7} Crim.R. 33(A)(6) allows a new trial to be granted on the ground of newly discovered evidence. A new trial on grounds of "newly discovered

evidence" will be granted only upon the defendant's showing 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 the former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶ 8} Information that the codefendant had his attempted murder count dismissed after he testified is not evidence relevant to Greene's guilt on the felonious assault counts. Once the court granted Greene's motion for judgment of acquittal on the attempted murder count, any evidence relating to the disposition of that same count against the codefendant became immaterial.

{¶ 9} We likewise find nothing in the subsequent dismissal of the codefendant's attempted murder count that could have affected his credibility at Greene's trial. He supposedly told the jury that he pleaded guilty to one count of attempted murder and two counts of felonious assault, with firearm specifications. At the time he testified, this testimony was apparently truthful — the court dismissed the attempted murder count against the codefendant after Greene's trial ended.

{¶ 10} Finally, there is no probability whatsoever that the outcome of Greene's trial would have been different had the jury been informed that his

codefendant had been acquitted on the attempted murder count. Having been acquitted on the attempted murder count himself, Greene could not be placed in jeopardy for that charge. A retrial to allow the jury to hear that the codefendant had been acquitted of that which could no longer be charged against Greene would serve no purpose.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR