[Cite as *State v. Bronczyk*, 2016-Ohio-7494.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104326

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH J. BRONCZYK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-540345-A

BEFORE: Boyle, J., E.A. Gallagher, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 27, 2016

FOR APPELLANT

Joseph J. Bronczyk, pro se
9115 Pinegrove Avenue
Parma, Ohio 44129

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Mary McGrath
Assistant County Prosecutor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Joseph Bronczyk, appeals from a judgment denying his motion for new trial. He raises two assignments of error for our review:

> 1. The trial court abused its discretion when it determined the appellant was not prevented from filing a timely motion for new trial within fourteen days after the jury verdict.
>
> 2. The trial court abused its discretion when it denied appellant's motion for leave to file a new trial motion under [Crim.R.] 33(B), without holding a hearing to determine the threshold issue of whether appellant was unavoidably prevented from discovering his evidence within fourteen days of the trial verdict.

{¶2} Finding no merit to his appeal, we affirm.

I. Procedural History

{¶3} In January 2011, Bronczyk was convicted of burglary, attempted burglary, theft, possession of criminal tools, and tampering with evidence. The charges arose from two separate incidents in July 2010, where Bronczyk broke into one home and then attempted to break into another home. The trial court sentenced Bronczyk to eight years in prison.

{¶4} Bronczyk appealed his convictions. This court affirmed his burglary, attempted burglary, and possession of criminal tools convictions, but we modified his felony theft conviction to misdemeanor theft and vacated his tampering with evidence conviction. *See State v. Bronczyk*, 8th Dist. Cuyahoga No. 96326, 2011-Ohio-5924, *discretionary appeal not allowed*, *State v. Bronczyk*, 131 Ohio St.3d 1474, 2012-Ohio-896, 962 N.E.2d 805.

{¶5} Upon remand from this court, the trial court sentenced Bronczyk to six years in prison. Bronczyk appealed, but the appeal was dismissed. Bronczyk moved to reopen his appeal, which was denied. *See State v. Bronczyk*, 8th Dist. Cuyahoga No. 98664, 2013-Ohio-3129.

{¶6} In May 2014, Bronczyk applied for DNA testing. The trial court denied his application, which this court affirmed. *See State v. Bronczyk*, 8th Dist. Cuyahoga No. 102317, 2015-Ohio-2765 ("DNA appeal").

{¶7} In November 2015, Bronczyk moved for leave to file a motion for new trial ("motion for new trial"), which is the motion at issue in the present appeal. The trial court denied Bronczyk's motion in March 2016. It is from this judgment that Bronczyk now appeals.

II. Relevant Trial Facts

{¶8} In his motion for new trial, Bronczyk only sought a new trial for his convictions relating to the second incident, attempted burglary and possessing criminal tools, that occurred on July 31, 2010. The relevant facts relating to this incident are as follows as set forth in his direct appeal.

{¶9} The victim testified at trial that she saw a strange man walk into her backyard. She then heard the handle of her screen door "jiggle." *See Bronczyk*, 8th Dist. Cuyahoga No. 96326, 2011-Ohio-5924, at ¶ 14. She approached her back door and saw a man trying to get in the window of her children's bedroom. The victim called 911. While she was on the phone, she said the man returned to her back door

with a screwdriver in his hand. At that point, she said that she was "face to face" with the man, with only the "glass of the door" between them. *Id.* at ¶ 15. When the man saw the victim in the window, he ran.

{¶10} A police officer who heard the radio dispatch about the attempted break-in advised his colleagues that the description of the incident and the male suspect were similar to an earlier burglary in which he had been involved. He gave the other officers Bronczyk's address.

{¶11} Police officers arrived at Bronczyk's house just as he was walking up to his house. Police officers took Bronczyk to the victim's home. She identified Bronczyk in a "cold stand" as the man who attempted to enter her home. *Id.* at ¶ 18. After Bronczyk was arrested, police recovered a screwdriver from Bronczyk's driveway.

{¶12} At his trial, the prosecutor informed the court that the screwdriver was tested for latent fingerprints, but none were found. The prosecutor further elicited testimony from the police officer who found the screwdriver that the screwdriver was tested for latent fingerprints but none were found.

III. Documents Attached to Bronczyk's Motion

{¶13} Bronczyk attached the following relevant documents to his motion: (1) copies of Bronczyk's mother's letters to police requesting public records, (2) copies of Parma police's release of public records, (3) Bronczyk's mother's affidavit, and (4) Bronczyk's affidavit. The following information comes from these documents.

{¶14} In June 2014, Bronczyk's mother requested public records from police regarding the "crime lab results" that were conducted on the screwdriver. According to the "Parma Police Department Release of Public Records," there were "no crime lab results on file."

{¶15} In August 2014, Bronczyk's mother requested the "chain of custody record" for the screwdriver, from the time it was collected and entered into the evidence room, as well as who signed it "in and out of the evidence room at all times." The Parma Police Department released the screwdriver's "property record." The property record contained a series of codes describing when an action was taken by police including what date and by whom. The property record does not contain a key describing the codes. Although Bronczyk's mother attempted to define the codes in her affidavit, that is not proof of what they actually mean without an affidavit from the records custodian from the Parma Police Department or a police officer with knowledge about the screwdriver's chain of custody. Nonetheless, for purposes of this appeal, we will accept as true Bronczyk's claim that he discovered through his mother's public record requests that the screwdriver was never tested for fingerprints.

{¶16} Bronczyk's mother further averred that the screwdriver was in the driveway because she had thrown it out there after cutting her hand on it. She requested the records relating to the screwdriver because she wanted to prove that her fingerprints were on the screwdriver, and not her son's — because she "was the only one to touch it."

{¶17} Bronczyk explained in his affidavit that after the trial court denied his application for DNA testing in the beginning of June 2014, he and his mother decided to independently have the screwdriver tested for DNA. They decided to use the lab where police had sent the screwdriver for fingerprint testing, which is why his mother made the first public records request on June 8, 2014, to find out where Parma police had sent the screwdriver for testing. Bronczyk stated that it was through these record requests that he learned the screwdriver was never tested.

IV. Motion for New Trial

{¶18} In his first assignment of error, Bronczyk argues that the prosecutor's misconduct in eliciting false testimony and misrepresenting the evidence to him, his defense counsel, and the court violated his due process rights, entitling him to a new trial. He further argues that he could not have discovered this information within 14 days of the jury's verdict. In his second assignment of error, he maintains that the trial court should have held a hearing on his motion. We will address these arguments together because Bronczyk does.

{¶19} Crim.R. 33 sets forth the grounds upon which a defendant may file a motion for new trial. It states that

> [a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
>
> (5) Error of law occurring at the trial;
>
> (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a 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, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶20} Crim.R. 33(B) sets forth the time limits for filing a motion for new trial depending on the reason in Crim.R. 33(A). For any of the reasons set forth in Crim.R. 33(A)(1) through (5), the motion:

> 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.

Crim.R. 33(B).

{¶21} For the reason set forth in Crim.R. 33(A)(6), which is based on newly discovered evidence, motions for a new trial must be filed within one hundred twenty days after the verdict was rendered, unless it appears by "clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence[.]"

{¶22} Courts have held that

> 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. Parker, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 16 (2d Dist.), citing *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

{¶23} By its terms, Crim.R. 33 does not require a hearing on a motion for new trial. Thus, the decision to conduct a hearing is one that is entrusted to the discretion of the trial court. *State v. Smith*, 30 Ohio App.3d 138, 139, 506 N.E.2d 1205 (9th Dist.1986). The decision whether to grant a motion for new trial also lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).

V. "Unavoidably Prevented" from Filing the Motion Timely

{¶24} The trial court denied Bronczyk's motion without opinion. Nonetheless, Bronczyk argues that the trial court erred by denying his motion because it found that he was unavoidably prevented from discovering the prosecutor's misconduct within 14 days of the jury's verdict. For the sake of addressing the merits of his motion for a new trial, however, we agree with Bronczyk that he established that he was unavoidably prevented

from discovering the alleged prosecutorial misconduct within 14 days of the jury's verdict.

VI. Crim.R. 33(A)(2) — Prosecutorial Misconduct

{¶25} In his motion for new trial, Bronczyk stated that it was "based on the grounds of prosecutorial misconduct under Crim.R. 33(A)(2) and newly discovered evidence under Crim.R. 33(A)(6)." Although Bronczyk asserts that he just discovered the alleged prosecutorial misconduct (which is presumably why he claims that it is "newly discovered evidence"), the substance of his motion only raises issues relating to alleged prosecutorial misconduct.

{¶26} When a motion for new trial alleges prosecutorial misconduct, we undertake a due process analysis to determine whether the misconduct of the prosecutor deprived the defendant of his due process right to a fair trial. *State v. Johnston*, 39 Ohio St.3d 48, 59-60, 529 N.E.2d 898 (1988). Assuming for the sake of argument that the prosecutor in this case committed misconduct, we must determine whether that purported misconduct was so egregious as to deny Bronczyk his fundamental right to a fair trial. *State v. Adams*, 4th Dist. Scioto Nos. 04CA2959 and 05CA2986, 2009-Ohio-6491, ¶ 80.

{¶27} In cases where the defendant claims that the prosecutor suppressed properly discoverable, exculpatory evidence, the *Johnston* court notes:

> [T]he usual standards for new trial are not controlling because the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason, the defense

> does not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, the standard generally used to evaluate motions filed under Crim.R. 33.

Johnston at 60.

{¶28} By withholding evidence favorable to the accused, the prosecution violates the defendant's due process right to a fair trial where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecutor. *Johnston* at 60.

{¶29} The key question is whether the suppressed evidence is "material." *Id.* In *Johnston*, the Ohio Supreme Court adopted the test for materiality set out in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1984). Under *Bagley*, suppressed evidence favorable to the accused is material only if there is a reasonable probability that the result of the proceeding would have been different if that evidence had been disclosed to the defense. *Johnston* at 61, citing *Bagley* at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus. The test, however, is stringent and the mere possibility that an item of undisclosed information might have helped the defense or might have affected the trial does not establish materiality. *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991), citing *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

{¶30} Before we get to the merits of Bronczyk's arguments, we note that he has not established that the screwdriver was not tested for fingerprints because he failed to obtain an affidavit from the records custodian at the Parma Police Department or from a police officer with knowledge about the screwdriver's chain of custody. Nonetheless, we will assume for the sake of argument that his mother's and his affidavits were sufficient to establish that the screwdriver was never tested.

{¶31} In Bronczyk's DNA appeal, this court explained:

> The trial court concluded that DNA exclusion would not be "outcome determinative." R.C. 2953.71(L) defines that term as follows:
>
> > (L) "Outcome determinative" means that had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of section 2953.74 of the Revised Code, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense[.]
>
> The trial court's conclusion on this point finds support in the record. First, Bronczyk's convictions on Counts 4 [attempted burglary] and 5 [possessing criminal tools] were related. Bronczyk's argument is directed only to his conviction on Count 4 for attempted burglary, yet, even in *Bronczyk I*, he never challenged his conviction of possession of criminal tools, to wit: a screwdriver, as alleged in Count 5. Second, only a few minutes after the attempted burglary, the victim positively identified Bronczyk as the person who had tried to break into her house. *See State v. Broadnax*, 2d Dist. Montgomery No. 24121, 2011-Ohio-2182. The victim looked at Bronczyk face to face at her back door and then again during the cold stand. Third, the police officer who picked up the tool admitted he never observed Bronczyk holding it. However, the victim

> identified the screwdriver as the one the defendant had in his possession. Fourth, because Bronczyk lived with his mother, logically, she may have handled the screwdriver at some point. Thus, in the context of Bronczyk's trial, even had his mother's DNA been found on the screwdriver, that would not have amounted to a "strong probability that no reasonable factfinder would have found the offender guilty" of the offense of attempted burglary. *State v. Swanson*, 5th Dist. Ashland No. 05 CA 13, 2005-Ohio-5471, ¶ 14. Nevertheless, the victim's eyewitness testimony was sufficient for attempted burglary.

Bronczyk, 8th Dist. Cuyahoga No. 102317, 2015-Ohio-2765, at ¶ 11-12.

{¶32} Our analysis regarding the Bronczyk's DNA appeal, the trial court's denial of his DNA application, is instructive here. Just as we pointed out in that appeal that the victim in the attempted burglary case identified Bronczyk within minutes of the attempted burglary, it is also relevant here. The victim watched Bronczyk walk into her yard, attempt to break into her children's bedroom window, and then was "face to face" with him at her back door. She then identified him in a "cold stand" soon after she reported the crime to police.

{¶33} Further, we stated in his DNA appeal that even if the mother's DNA had been found on the screwdriver, Bronczyk lived with his mother, and thus, it was likely that she would have handled the screwdriver at some point. That same reasoning applies here. Even if Bronczyk's mother's fingerprints were found on the screwdriver, she lived with Bronczyk. The fact that her fingerprints were on the screwdriver would not change the outcome of Bronczyk's trial. Thus, Bronczyk's discovery of purported prosecutorial misconduct — that the screwdriver was never tested — was not material to

his trial because there is not a reasonable probability that the result of the proceeding would have been different if that evidence had been disclosed to the defense.

{¶34} We further find no error in the trial court denying Bronczyk's motion for new trial without holding a hearing on the motion. The trial judge reviewing Bronczyk's motion for new trial also presided over his trial. "'[T]he acumen gained by the trial judge who presided during the entire course of [the] proceedings makes him well qualified to rule on the motion for a new trial on the basis of the affidavit[s] and makes a time consuming hearing unnecessary.'" *State v. Monk*, 5th Dist. Knox No. 03CA12, 2003-Ohio-6799, ¶ 20, quoting *United States v. Curry*, 497 F.2d 99, 101 (5th Cir.1974).

> "The trial judge is in a peculiarly advantageous position * * * to pass upon the showing made for a new trial. [The judge] has the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives that prompted the recantation. [The judge] is, therefore, best qualified to determine what credence or consideration should be given to the retraction, and [the judge's] opinion is accordingly entitled to great weight. If the rule were otherwise, the right of new trial would depend on the vagaries and vacillations of witnesses rather than upon a soundly exercised discretion of the trial court."

Taylor v. Ross, 150 Ohio St. 448, 452, 83 N.E.2d 222 (1948), quoting *State v. Wynn*, 178 Wash. 287, 34 P.2d 900 (1934).

{¶35} Accordingly, we overrule Bronczyk's two assignments of error.

{¶36} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR