[Cite as *State v. Hubbard*, 2020-Ohio-2726.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108853
v.	:	
CORDELL HUBBARD,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 30, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-03-435700-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee.*

Allison F. Hibbard, *for appellant.*

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant Cordell Hubbard brings the instant appeal challenging the trial court's judgment denying his motion for leave to file a motion for a new trial. Appellant argues that he is entitled to a new trial based on newly discovered evidence from eyewitnesses and that the trial court abused its discretion

by summarily denying his motion. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} This appeal arose from the murder of Omar Clark ("Omar") in November 2002, on Englewood Road in Cleveland, Ohio.

{¶ 3} Before the shooting occurred, Omar, Clark Williams ("Williams"), and appellant's sister and codefendant Nicole Hubbard, were playing cards with Maria Whitlow and Ellen Taylor ("Taylor"), at Taylor's house. Omar, Williams, and appellant's sister left the house to purchase and smoke a PCP cigarette. Omar borrowed $20 from appellant's sister to purchase the PCP cigarette. Omar, Williams, and appellant's sister all smoked the PCP cigarette.

{¶ 4} Later in the evening, appellant's sister asked Omar to reimburse the $20 he borrowed from her. When Omar indicated that he would only repay appellant's sister $10, she "flipped out," became hysterical, and called appellant. Appellant's sister told appellant that Omar and Williams were trying to play her and that she was on Englewood Road in Cleveland.

{¶ 5} Less than five minutes after appellant's sister called appellant, appellant arrived on Englewood Road and began arguing with Omar over the money. Appellant arrived with another individual. The state's original theory was that appellant arrived with codefendant Rue-El Sailor,[1] and that Sailor killed Omar.

[1] Cuyahoga C.P. No. CR-03-435700-B.

Subsequently, based on new evidence that was unavailable at the time of trial, it was determined that appellant arrived with William Sizemore, not Sailor, and it was appellant, not Sailor, that shot Omar.

{¶ 6} Appellant called his sister and asked her what the people who tried to "play" her were wearing. As appellant and Omar continued to argue, Williams observed the individual that arrived with appellant had a handgun. Williams ran away from the scene and heard several shots fired behind him. Williams also felt a bullet graze his right buttock. Omar was shot 11 times. *State v. Hubbard*, 8th Dist. Cuyahoga No. 83384, 2004-Ohio-4627, ¶ 4.

{¶ 7} A jury trial commenced in May 2003. Appellant, his sister Nicole, and Sailor were tried together. Appellant did not testify at trial. In June 2003, appellant was convicted of complicity to commit aggravated murder, murder, complicity to commit murder, two counts of kidnapping, two counts of complicity to commit kidnapping, two counts of felonious assault, and two counts of complicity to commit felonious assault. All 11 counts contained one-year firearm specifications.

{¶ 8} On June 19, 2003, appellant filed a motion for a new trial and a judgment of acquittal. The state filed a brief in opposition on July 23, 2003.

{¶ 9} Sailor also filed a motion for a new trial on June 19, 2003. Appellant submitted an affidavit on August 12, 2003, in support of Sailor's motion for a new trial. In appellant's affidavit, he stated that he shot and killed Omar in self-defense.

{¶ 10} On July 23, 2003, the state filed a motion to amend the indictment. Following a hearing, the trial court granted the state's motion to amend the

indictment. The trial court amended the complicity offenses charged in the indictment from violations of R.C. 2923.01 to violations of R.C. 2923.03.

{¶ 11} The trial court held a sentencing hearing in July 2003. Appellant advised the trial court, for the first time at sentencing, that Sailor was not present at the murder. Specifically, appellant stated "that he was with a man named Will on the night of the shooting and that Sailor was not there." *Hubbard* at ¶ 7. The trial court sentenced appellant to an aggregate prison term of 23 years to life.[2]

{¶ 12} On August 27, 2003, before the trial court ruled on his motion for a new trial, appellant filed an appeal challenging his convictions and the trial court's sentence. *Hubbard*, 8th Dist. Cuyahoga No. 83384, 2004-Ohio-4627. On September 2, 2004, this court affirmed the trial court's judgment in its entirety.

{¶ 13} In September 2003, after appellant filed his direct appeal, the trial court scheduled a hearing on appellant's motion for a new trial. The trial court's September 11, 2003 judgment entry provides, in relevant part, "This court is divested of jurisdiction, as this defendant has filed an appeal with the 8th District Court of Appeals."

{¶ 14} Sailor, unlike appellant, did not file an appeal divesting the trial court of jurisdiction to rule on his motion for a new trial. The trial court held a hearing on Sailor's motion for a new trial on September 4, 2003. Appellant testified during the trial court's hearing. Specifically, appellant asserted "that he shot [Omar] in self-

[2] The trial court's sentencing journal entry was filed on May 14, 2004.

defense [(a defense never asserted at trial)] while accompanied by a man named William Sizemore and that Sailor had nothing to do with the shooting." *Hubbard* at ¶ 7. The trial court denied Sailor's motion for a new trial.

{¶ 15} On June 21, 2010, appellant filed a pro se "motion for sentencing" and to vacate or set aside sentence. The state filed a brief in opposition on August 24, 2010. The trial court denied appellant's motion for sentencing on August 31, 2010. Thereafter, the trial court denied appellant's motion to vacate or set aside sentence on December 15, 2010.

{¶ 16} On March 11, 2011, appellant filed a pro se motion for leave to file a delayed appeal. *State v. Hubbard*, 8th Dist. Cuyahoga No. 96526. On April 8, 2011, this court denied appellant's motion to file a delayed appeal and dismissed the appeal.

{¶ 17} On April 27, 2012, appellant filed a motion "to correct the judgment entry/correction of the record and vacate void judgment of the conviction and sentence pursuant to [Crim.R.] 32 and [R.C.] 2505.02[.]" The state filed a brief in opposition on May 15, 2012. The trial court denied appellant's motion on May 17, 2012.

{¶ 18} Appellant filed a "reply" to the state's brief in opposition to his motion to correct void conviction and sentence. The state filed a response to appellant's "reply" on June 11, 2012. The trial court denied appellant's "reply" on June 19, 2012.

{¶ 19} On June 25, 2012, appellant filed a pro se appeal and a motion to proceed in forma pauperis. *State v. Hubbard*, 8th Dist. Cuyahoga No. 98600. On

July 29, 2012, this court denied appellant's motion to proceed in forma pauperis and dismissed the appeal for failure to comply with App.R. 4(A).

{¶ 20} On July 20, 2012, appellant, acting pro se, filed a motion for leave to file a delayed appeal, a motion to proceed in forma pauperis, and a motion for an order directing the clerk of courts to provide appellant with a copy of the trial court's May 17, 2012 judgment entry denying his motion to correct void judgment and sentence. *State v. Hubbard*, 8th Dist. Cuyahoga No. 98694. On August 8, 2012, this court denied appellant's motion for leave to file a delayed appeal and dismissed the appeal.

{¶ 21} On November 8, 2012, appellant filed a motion for a delayed appeal in the Ohio Supreme Court. *State v. Hubbard*, Supreme Court of Ohio Case No. 2012-1899. The Ohio Supreme Court denied appellant's motion and dismissed the appeal on January 23, 2013.

{¶ 22} On May 5, 2019, appellant filed a motion for leave to file a motion for a new trial. Therein, appellant argued that he was entitled to a new trial based on newly discovered evidence.

{¶ 23} In support of his motion for leave, appellant referenced and incorporated a "joint motion to vacate conviction" pertaining to Sailor. This joint motion was filed by Sailor's attorneys, members of the prosecutor's office's conviction integrity unit ("CIU"), and the Ohio Innocence Project.

{¶ 24} Regarding the newly discovered evidence upon which appellant argued he was entitled to a new trial, appellant identified the following evidence:

(1) a portion of the transcript from Sizemore's CIU interview; (2) Sizemore's March 2018 affidavit; (3) a portion of the transcript from Williams's CIU interview; (4) Williams's March 2018 affidavit; (5) the joint motion to vacate Sailor's conviction; (6) an affidavit executed by appellant in March 2019; and (7) an affidavit from appellant's trial counsel.

{¶ 25} On July 11, 2019, the trial court summarily denied appellant's motion for leave to file a motion for a new trial without holding a hearing. It is from this judgment that appellant filed the instant appeal on July 29, 2019. Appellant assigns one error for review:

> I. The trial court abused its discretion in denying [appellant's] motion for leave to file motion for new trial.

II. Law and Analysis

{¶ 26} In his sole assignment of error, appellant argues that the trial court abused its discretion in denying his motion for leave to file a motion for a new trial.

A. Standard of Review

{¶ 27} Motions for a new trial are governed by Crim.R. 33. Pursuant to Crim.R. 33(B), a motion for new trial based on newly discovered evidence must be filed within 120 days of a jury verdict unless the petitioner demonstrates by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence upon which he or she must rely. A party is "'unavoidably prevented'" from discovering evidence "'if the party had no knowledge of the existence of the ground supporting the motion'" and could not have learned of that existence in the

exercise of reasonable diligence within the time prescribed by the rule. *See State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 17, quoting *State v. Lee*, 10th Dist. Franklin No. 05AP-229, 2005-Ohio-6374, ¶ 7; *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 27 (8th Dist.).

{¶ 28} If a defendant files a motion for a new trial after the 120-day period has expired, the defendant must first seek leave of the trial court to file a delayed motion for a new trial. *State v. Mathis*, 134 Ohio App.3d 77, 79, 730 N.E.2d 410 (1st Dist.1999). To obtain leave, the defendant must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the new evidence within the 120-day time period under Crim.R. 33(B). *Id.*

{¶ 29} The burden is on the defendant to show by clear and convincing proof that he or she was unavoidably prevented from filing his or her motion within the time prescribed. In order to meet this burden, the defendant must present "more than a mere allegation that he [or she] was unavoidably prevented from discovering the evidence he [or she] seeks to introduce to support a new trial." *State v. Cowan*, 8th Dist. Cuyahoga No. 108394, 2020-Ohio-666, ¶ 10, citing *State v. Bridges*, 8th Dist. Cuyahoga Nos. 103634 and 104506, 2016-Ohio-7298, ¶ 20. "When a defendant files a motion for leave to file a motion for a new trial, the trial court may not consider the merits of the motion for a new trial until it first makes a finding of unavoidable delay." *Cowan* at ¶ 8, citing *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 14.

{¶ 30} In addition to demonstrating that he or she was unavoidably prevented from discovering the new evidence, a defendant must demonstrate that the motion for leave was filed within a reasonable time after discovering the new evidence. *Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, at ¶ 18. The determination of whether a delay is reasonable is based on the facts and circumstances of the case and whether the defendant presents an adequate explanation for the delay in filing his or her motion for leave. *Id*.

> This court reviews the denial of leave to file an untimely motion for new trial for an abuse of discretion. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 13 (8th Dist.). We further review the decision on whether to hold a hearing on the motion for an abuse of discretion. *Id*. at ¶ 24. "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *In re C.K.*, 2d Dist. Montgomery No. 25728, 2013-Ohio-4513, ¶ 13, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985).

State v. Collins, 8th Dist. Cuyahoga No. 108486, 2020-Ohio-918, ¶ 37.

B. Newly Discovered Evidence

{¶ 31} In his motion for leave, appellant argued that he was entitled to a new trial based on the newly discovered evidence of William Sizemore and Clark Williams.

1. William Sizemore

{¶ 32} In support of his motion for leave, appellant submitted an affidavit executed by Sizemore in March 2018. Therein, Sizemore averred that he was friends with appellant in 2002 and was present at the time of the November 2002 shooting. Sizemore tried to intervene in the dispute between appellant and Omar, and told

appellant not to shoot Omar because he is like family to him. During the argument, Sizemore noticed that Omar "had a gun and was holding it down by his side[.]" Despite Sizemore's attempts to intervene in the argument, appellant shot and killed Omar.

{¶ 33} Appellant also submitted a portion of the transcript from Sizemore's CIU interview. During the interview, Sizemore stated that "[appellant] and [Omar] were arguing and [appellant] shot him." Sizemore asserted that he did not tell anybody that Sailor was not involved in the shooting because he wanted to protect his own life and the life of others. He was also abusing drugs and dealing with the loss of his child's mother at the time.

2. Clark Williams

{¶ 34} In support of his motion for leave, appellant submitted an affidavit executed by Williams on March 20, 2018. Therein, Williams averred that he was present at the time of the shooting. Appellant got in Williams's face and was yelling at him about a situation involving his sister. The male with appellant was holding a gun. Williams sensed the controversy was escalating, so he turned and ran. As he was running, Williams heard a series of gunshots and his backside was grazed by a bullet.

{¶ 35} Williams averred that he circled back to the street where the shooting took place and observed Omar's cousin (Lionel) take a gun out of Omar's hand after Omar had been shot. Lionel struck Williams in the head when he returned to the area.

{¶ 36} Williams was unable to identify the other male who was with appellant at the time of the shooting. The only reason he identified Sailor in court was because his female friend at the time, Taylor, was present in court with Williams and indicated to him that Rue-El Sailor was the person with appellant on the night of the murder. Williams believed what Taylor told him was true because at the time, she was best friends with appellant's sister. Williams did not come forward earlier because he did not want to disparage Taylor and Omar.

{¶ 37} Appellant also submitted a portion of the transcript from Williams's CIU interview. During the interview, Williams asserted that they were all high on PCP on the night of the shooting. The person with appellant had a gun. Williams did not know whether appellant had a gun. Williams shoved appellant and ran away. When he was running away, his backside was grazed by a bullet. He did not know who shot him in the backside. Williams circled back around the block and saw a body in the street. Omar's cousin Lionel grabbed the gun from Omar's hand on the ground. Lionel hit Williams in the head with the gun he retrieved from Omar.

{¶ 38} Williams did not have a gun. Williams did not know whether appellant had a gun, and he never saw appellant pull out a gun.

{¶ 39} A prosecuting attorney asked Williams why he told prosecutors at the time of the shooting that Omar had his gun out and had Williams's back during the controversy. Williams asserted that he was afraid, but explained that Omar did not use the gun: "[w]hen [Omar] pulled it out. He just flashed it[.]" Williams asserted, "I was trying to, [Omar is] my friend, and I'm going to defend my friend. I'm not

going to tell [investigators] well Omar pulled a gun out on [appellant] and then they shot him. But that ain't what happened, [Omar] just had a gun, protection. I just left it out [when he previously spoke with investigators]."

{¶ 40} Williams did not come forward earlier to talk about the shooting. Investigators attempted to talk to Williams on approximately six occasions the previous year when he was serving six months, but he refused to speak with them. Williams explained that he subsequently agreed to talk to CIU prosecutors because he wanted justice for his friend Omar.

C. Unavoidably Prevented From Discovery

{¶ 41} As noted above, appellant was required to seek leave of the trial court to file his motion for a new trial because appellant filed his motion more than 120 days after the jury returned its verdict. In order to obtain leave, appellant was required to demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence of Sizemore and Williams.

{¶ 42} In his motion for leave, appellant asserted,

> Defendant, Cordell Hubbard, was unavoidably prevented from discovering critical information regarding the State's eyewitnesses, Clark Williams, and eyewitness William Sizemore within 120 days of the verdict. Although [*appellant*] *himself always knew Omar Clark had a gun and had behaved in a threatening manner*, he did not know who "Will" was and he had no reason to suspect that William Sizemore would ever come forward or that Clark Williams would ever admit Omar Clark had a gun and he had misidentified Sailor.

(Emphasis added.) Motion for leave at p. 5.

{¶ 43} Regarding Sizemore, appellant asserted in his motion for leave that he was delayed in discovering and obtaining Sizemore's statements because he "did not know who 'Will' was and [appellant] had no reason to suspect that William Sizemore would ever come forward[.]" Appellant claimed that Sizemore's identity was not known to him until "after trial," and that Sizemore refused to discuss the case "for years." Appellant failed to identity what, if any, efforts were made to obtain Sizemore's statement between November 2002 and March 2018.

{¶ 44} Regarding Williams, appellant asserted in his motion for leave that he was delayed in discovering and obtaining Williams's statement because he had no reason to suspect that "Clark Williams would ever admit Omar Clark had a gun[.]" Appellant emphasized that although Williams testified at the original trial, he did not disclose that he saw Omar "flashing" a gun during the altercation with appellant.

{¶ 45} After reviewing the record, we are unable to conclude that the trial court's judgment denying appellant's motion for leave was unreasonable, arbitrary, or unconscionable. As an initial matter, we note that appellant relies heavily on the affidavits and CIU interviews of Sizemore and Williams as corroboration of his self-defense claim, which he did not raise at trial. Although the March 2018 affidavits of Sizemore and Williams are "new," the contents of the affidavits are not new as they relate to appellant.

{¶ 46} Appellant contends that Sizemore's and Williams's account of the shooting corroborate his self-defense claim. Appellant had prior knowledge, however, of the facts giving rise to his self-defense claim, as evidenced by his

testimony during the September 2003 hearing on Sailor's motion for a new trial. Furthermore, as noted above, appellant conceded in his motion for leave that he "always knew" of the facts giving rise to his self-defense claim — that Omar had a gun and was acting in a "threatening manner" when appellant shot him.

{¶ 47} Nevertheless, the record reflects that appellant failed to demonstrate, by clear and convincing evidence, that he was unavoidably prevented from discovering the "new" evidence based upon which he claims he is entitled to a new trial. The record reflects that appellant had knowledge of the existence of the ground supporting his motion — his self-defense claim — as early as 2003.

{¶ 48} During the July 2003 sentencing hearing, appellant, who did not testify at trial, told the trial court that he was with a man named "Will" on the night of the shooting and that Sailor was not present. Appellant submitted an affidavit in support of Sailor's June 2003 motion for a new trial, in which appellant stated that he shot and killed Omar in self-defense. During the September 2003 hearing on Sailor's motion for a new trial, appellant testified that he shot Omar in self-defense, he was with William Sizemore on the night of the shooting, and Sailor had nothing to do with the incident. "[A]t the [September 4, 2003] hearing on [Sailor's] motion for a new trial, Cordell [Hubbard] testified that he shot the victim in self-defense and that the victim was armed." *State v. Sailor*, 8th Dist. Cuyahoga No. 83552, 2004-Ohio-5207, ¶ 45.

{¶ 49} Accordingly, the record clearly reflects that appellant had knowledge of the facts giving rise to his self-defense claim as early as 2003.

{¶ 50} To the extent that appellant argues he is entitled to a new trial because he had no knowledge of the existence of eyewitnesses Sizemore and Williams and could not have learned of their existence in the exercise of reasonable diligence, this argument is entirely unsupported by the record.

{¶ 51} Appellant was aware of Sizemore's identity as an eyewitness within 120 days of the verdict. In his March 2019 affidavit, appellant averred that he did not know until after trial that the man that was with him at the time of the shooting was William Sizemore. As noted above, appellant advised the trial court during his July 2003 sentencing hearing that he was with a man named "Will" on the night of the shooting and that Sailor was not present. Subsequently, in September 2003, appellant testified that he was with William Sizemore at the time of the shooting. Assuming that appellant did not know Sizemore's identity at the time of trial, he was clearly aware of Sizemore's identity and the fact that Sizemore was an eyewitness to the shooting in September 2003.

{¶ 52} The purportedly new evidence pertaining to Sizemore was discoverable as early as September 2003 when appellant was aware of his identity. According to Sizemore's affidavit, after the 2002 shooting, he feared for his life and left the state of Ohio "for many years." If appellant or his defense team had investigated earlier, Sizemore could have been located and his statements about the incident could have been documented.

{¶ 53} Although Sizemore claims that he left the state of Ohio for "many years" there is no explanation as to where he was in hiding, when he returned to

Ohio, or why appellant was prevented from discovering Sizemore's account of the shooting between September 2003, when Sizemore's identity was known to appellant, and March 2018, when Sizemore executed his affidavit — a gap of more than 14 years. *See Hill* at ¶ 33.

{¶ 54} Appellant was also aware of Williams's identity within 120 days of the verdict. As noted above, Williams testified at the original trial in 2003.

{¶ 55} Accordingly, the record reflects that within the 120-day timeframe, appellant knew of (1) Sizemore's existence as an eyewitness, (2) Williams's existence as an eyewitness, and (3) the facts giving rise to his self-defense claim.

{¶ 56} "The phrases 'unavoidably prevented' and 'clear and convincing proof' do not allow one to claim that evidence was undiscoverable simply because affidavits were not obtained sooner." *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387, ¶ 11. A defendant cannot claim that evidence was undiscoverable merely because the defendant or his defense counsel made no effort to obtain the evidence sooner. *State v. Jackson*, 8th Dist. Cuyahoga No. 108241, 2019-Ohio-4893, ¶ 20, citing *State v. Cashin*, 10th Dist. Franklin No. 17AP-338, 2017-Ohio-9289.

> It is the duty of the criminal defendant and his [or her] trial counsel to make a serious effort, on their own, to discover potential, favorable evidence. *State v. Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, ¶ 9. Claims that evidence was undiscoverable simply because the defense did not take the necessary steps earlier to obtain the evidence do not satisfy the requisite standard [under Crim.R. 33]. *State v. Anderson*, 10th Dist. Franklin No. 12AP-133, 2012-Ohio-4733, ¶ 14; *see also State v. Golden*, 10th Dist. Franklin No. 09AP-1004, 2010-Ohio-4438, ¶ 15.

Collins, 8th Dist. Cuyahoga No. 108486, 2020-Ohio-918, at ¶ 45.

{¶ 57} In the instant matter, despite having knowledge of the existence of Sizemore and Williams as eyewitnesses to the shooting, appellant simply chose not to locate or contact these eyewitnesses, or failed to exercise reasonable diligence in attempting to do so. Appellant failed to clearly and convincingly demonstrate that he was unavoidably prevented from timely discovering Sizemore's and Williams's statements.

D. Untimely Motion for Leave

{¶ 58} We further find that appellant failed to establish that he filed his motion for leave within a reasonable time after discovering the purportedly new evidence of Sizemore and Williams.

{¶ 59} In his motion for leave, appellant asserted, in relevant part, that Williams and Sizemore

> both made clear they were previously unwilling to talk about the incident and did not sign sworn statements until March of 2018. The March 2018 affidavits led to Rue-El Sailor's previously referenced Joint Motion. [Appellant] did not receive copies of the Sizemore statement or Williams affidavit until a few months later. Shortly thereafter [appellant] sought counsel to pursue his own claims.

Motion for leave at p. 6. Appellant does not specify when he received the "new" evidence.

{¶ 60} In his March 2019 affidavit, appellant averred that he found out "in early 2018 that William Sizemore had finally spoken about the shooting. I received a copy of William Sizemore's statement in late 2018." Appellant does not specify

when he received Sizemore's affidavit or the transcript from Sizemore's CIU interview.

{¶ 61} As noted above, Williams's affidavit was executed on March 20, 2018, and Sizemore's affidavit was executed in March 2018. Appellant does not specify when the CIU interviews of Sizemore or Williams were conducted.

{¶ 62} Appellant filed his motion for leave on May 5, 2019, more than one year after the affidavits of Sizemore and Williams were executed. "A delay of more than one year between the receipt of new evidence and the filing of a motion for leave has been found to constitute an unreasonable delay." *State v. Hill*, 8th Dist. Cuyahoga No. 108250, 2020-Ohio-102, ¶ 28, citing *State v. Bryan*, 8th Dist. Cuyahoga No. 105774, 2018-Ohio-1190, ¶ 8.

{¶ 63} For all of the foregoing reasons, the trial court did not abuse its discretion in denying appellant's motion for leave to file a motion for a new trial. Appellant failed to demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering the purportedly new evidence or that he filed his motion for leave within a reasonable time after discovering the evidence upon which he relies.

{¶ 64} Appellant's sole assignment of error is overruled.

{¶ 65} 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 issue out of this court directing the 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
RAYMOND C. HEADEN, J., CONCUR