

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 109150
	:	
v.	:	
	:	
CHARLES C. HUNDLEY,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 25, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-612938-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Callista Plemel, Assistant Prosecuting Attorney, *for appellee*.

Charles C. Hundley, *pro se*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Charles C. Hundley, pro se, appeals the denial of a motion for new trial and claims the following three errors:

1. The trial court erred in the findings of fact [sic] was against insufficient evidence.

2. The trial court erred when it did not declare a mistrial upon the state's misuse of the evidence and not submitting Hundley's magazine clip, and the .38 caliber shells to prove where these fragments came from, [and] ineffective assistance of counsel occurred [sic] when he did not submit the evidence.

3. The trial court abused its discretion in denying appellant's motion for new trial pursuant to the requirement set forth in Criminal Rule 33(A)(4).

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} In January 2017, Hundley was charged with two counts of murder in violation of R.C. 2903.02(A), two counts of felonious assault in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2), one count of involuntary manslaughter in violation of R.C. 2903.04(A), one count of having a weapon while under disability in violation of R.C. 2923.13(A)(2), and one count of receiving stolen in violation of R.C. 2913.51(A).

{¶ 4} The murder, felonious assault, and involuntary manslaughter charges included one- and three-year firearm specifications as well as notices of prior conviction and repeat violent offender specifications. The charges alleged that Hundley shot and killed Gregory Clark at a party at the home of Deonte Dudley and Kelasha Bedell on December 31, 2016.

{¶ 5} Following a bench trial in June 2017, Hundley was convicted of two counts of murder, two counts of felonious assault, one count of involuntary manslaughter, and one count of having a weapon while under disability; the trial court dismissed the one count of receiving stolen property pursuant to a motion for

acquittal under Crim.R. 29. Hundley appealed his convictions, arguing that (1) the trial court violated his Fifth Amendment rights by allowing the state to comment on his prearrest silence, (2) his convictions were against the manifest weight of the evidence, and (3) ineffective assistance of counsel. This court affirmed his convictions. *See State v. Hundley*, 8th Dist. Cuyahoga No. 106235, 2018-Ohio-3566.

{¶ 6} In September 2019, Hundley filed a pro se motion for a new trial, arguing his convictions were not supported by sufficient evidence and that the trial court should have declared a mistrial because the state's firearms expert never examined the magazine from Hundley's 9 mm Smith & Wesson handgun and shell casings from a revolver allegedly found at the scene to determine which firearm fired the fatal shot. Hundley also asserted that his trial counsel was ineffective for not demanding that these items be sent to the state's firearm's expert for examination and testing. The trial court denied Hundley's motion for new trial. This appeal followed.

II. Law and Analysis

A. Res Judicata

{¶ 7} In the first assignment of error, Hundley argues his convictions are not supported by sufficient evidence. In the second assignment of error, Hundley argues the trial court erred in failing to declare a mistrial based on the state's failure to submit the magazine to his 9 mm Smith & Wesson handgun and shell casings from another firearm found at the scene to the state's firearms expert. However, the

doctrine of res judicata bars a convicted defendant from raising a defense or claiming a lack of due process that was, or could have been, raised at trial or on direct appeal. *State v. Samuels*, 8th Dist. Cuyahoga No. 106520, 2018-Ohio-3675, ¶ 8, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). *See also State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997).

{¶ 8} Hundley could have raised issues regarding the sufficiency of the evidence and ineffective assistance of his trial counsel in his direct appeal. Indeed, Hundley argued in his direct appeal that his trial counsel was ineffective and that his convictions were against the manifest weight of the evidence. “[A] finding that a conviction [was] supported by the manifest weight of the evidence necessarily includes a finding of sufficiency.” *State v. Robinson*, 8th Dist. Cuyahoga No. 96463, 2011-Ohio-6077. Therefore, Hundley implicitly raised sufficiency of the evidence as an issue in his prior appeal, and we determined there was sufficient evidence to sustain his convictions when we found his convictions were not against the manifest weight of the evidence. *See Hundley* at ¶ 37-46.

{¶ 9} Although Hundley did not argue in his direct appeal that the court should have declared a mistrial due to the state’s alleged failure to provide Hundley’s magazine clip to its firearms expert, nothing prevented Hundley from raising that argument in his direct appeal if such an argument was warranted based on the

evidence presented at trial.¹ Therefore, the issues raised in Hundley's first and second assignments of error are barred by res judicata.

B. Motion for New Trial

{¶ 10} In the third assignment of error, Hundley argues the trial court abused its discretion in denying his Crim.R. 33 motion for new trial. He contends his rights to due process and a fair trial were violated because the state failed to submit the magazine clip from his Smith & Wesson handgun and shell casings from a revolver found at the scene to its firearms expert for analysis.

{¶ 11} A trial court's decision on a Crim.R. 33 motion for a new trial will not be reversed absent an abuse of discretion. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 13 (8th Dist.). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 13. When applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

{¶ 12} Crim.R. 33, governs motions for new trials, and states, in relevant part:

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

¹ Despite Hundley's claims to the contrary, "[f]orensic examinations of the black revolver, Smith & Wesson, Smith & Wesson magazine and bullet casings were conducted." *Hundley*, 8th Dist. Cuyahoga No. 106235, 2018-Ohio-3566, ¶ 13.

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.

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.

{¶ 13} Courts interpreting Crim.R. 33(B) have held that when a defendant seeks to file a motion for new trial after the 120-day deadline has expired, the defendant must follow a two-step procedure. *State v. Howard*, 2016-Ohio-504, 59 N.E.3d 685, ¶ 48 (10th Dist.); *State v. Andrejic*, 8th Dist. Cuyahoga No. 84093, 2004-Ohio-6571, ¶ 21, citing *State v. Gray*, 8th Dist. Cuyahoga No. 82841, 2003-Ohio-6643. The defendant must first request leave to file a motion for new trial by establishing, with clear and convincing evidence, that he was unavoidably prevented from discovering the grounds relied upon to support the motion for new trial within the time period provided by the rule. *State v. Bethel*, 10th Dist. Franklin No. 09AP-924, 2010-Ohio-3837, ¶ 13; *Gray* at ¶ 17. A person is unavoidably prevented from discovering grounds supporting the motion if the person had no knowledge of the existence of the grounds supporting the motion and could not have learned of their existence in the exercise of reasonable diligence within the time

prescribed by the rule. *State v. Phillips*, 8th Dist. Cuyahoga No. 104810, 2014-Ohio-7164, 95 N.E.3d 1017, ¶ 17.

{¶ 14} If the defendant establishes that he was unavoidably prevented from discovering the grounds on which he relies to support his motion for new trial, the defendant must file the motion for new trial within seven days from the trial court's order finding that the defendant was unavoidably prevented from filing a timely motion. *Id.*, citing *State v. Woodward*, 10th Dist. Franklin No. 08AP-1015, 2009-Ohio-4213.

{¶ 15} Hundley filed a motion for new trial more than two years after the trial court's verdict. It was, therefore, untimely under Crim.R. 33(B). Furthermore, even assuming that Hundley's motion for new trial was based on newly discovered evidence, he failed to file the motion within the 120-day deadline and was, therefore, required to follow the two-step procedure outlined in the rule. However, Hundley never filed a motion for leave to file a motion for new trial as required by Crim.R. 33(B). He has, therefore, failed to comply with the requirements of Crim.R. 33(B).

{¶ 16} Even if we were to construe Hundley's motion as a motion for leave to file a motion for new trial, he does not claim to have any newly discovered evidence nor does he allege that he could not have learned of the grounds for his motion with the exercise of reasonable diligence. His motion merely argues the merits of a motion for new trial. Therefore, the trial court properly denied Hundley's

motion as untimely and because it failed to meet the standard for granting a motion for leave to file a motion for new trial under Crim.R. 33(B).

{¶ 17} The third assignment of error is overruled.

{¶ 18} 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 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.

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J., CONCUR