[Cite as *State v. Briscoe*, 2021-Ohio-4317.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 110490
v.	:	
HARRY BRISCOE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 9, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-06-487410-A

Appearances:

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

Harry Briscoe, *pro se*.

MARY J. BOYLE, A.J.:

{¶ 1} Defendant-appellant, Harry Briscoe, appeals from the trial court's judgments denying, without an evidentiary hearing, his motions (1) for leave to file a delayed motion for a new trial and (2) for retesting fingerprint evidence. He raises three assignments of error for our review:

> (1) The trial court erred as a matter of law and abused its discretion in denying appellant's motion for leave to file [a] delayed motion for new trial without first conducting an evidentiary hearing where a hearing was mandated by law.
>
> (2) The trial court erred and abused its discretion in denying appellant's motion for leave to file [a] delayed motion for new trial where appellant clearly established that he was unavoidably prevented from obtaining the evidence on which the proposed motion for new trial relies within 120 days of the verdict.
>
> (3) The trial court erred and abused its discretion in denying appellant's motion for retesting of fingerprint evidence upon appellant's showing of irregularities in the initial testing and reported results.

{¶ 2} Finding no merit to the assignments of error, we affirm the trial court's judgments.

I. Procedural History and Factual Background

{¶ 3} As we explained in *State v. Briscoe*, 8th Dist. Cuyahoga No. 89979, 2008-Ohio-6276, in 2007, a jury found Briscoe guilty of one count of murder and two counts of aggravated robbery, and the trial court sentenced him to an aggregate of 28 years to life in prison:

> In October 2006, defendant was charged in a four-count indictment. Counts one and two charged him with aggravated murder. Counts three and four charged him with aggravated robbery. Counts one through three carried one- and three-year firearm specifications, a felony murder specification, two notice of prior conviction specifications, and two repeat violent offender specifications. Count four, the remaining aggravated robbery charge, carried one- and three-year firearm specifications, two notice of prior conviction specifications, and two repeat violent offender specifications.
>
> The matter proceeded to a jury trial, at which he was found guilty of murder, the lesser included offense under count two and both counts of aggravated robbery. The jury also found defendant guilty of the one- and three-year firearm specifications attached to all the three counts.

> The notice of prior conviction and repeat violent offender specifications were bifurcated and heard by the trial court, which found defendant guilty of the notice of prior conviction specification as charged in counts two, three, and four. The trial court found defendant not guilty of the repeat violent offender specifications.
>
> The trial court sentenced defendant to three years in prison on the firearm specifications, 15 years to life for murder, and 10 years for each aggravated robbery charge, to be served concurrently to each other, but consecutively to the murder charge, for an aggregate of 28 years to life in prison.

Briscoe at ¶ 2-5. Briscoe appealed, and this court affirmed his convictions for murder and one count of aggravated robbery and reversed the second aggravated robbery conviction due to a defective indictment. *Id.* at ¶ 29. The Ohio Supreme Court affirmed this court's judgment. *State v. Briscoe*, 124 Ohio St.3d 117, 2009-Ohio-6540, 919 N.E.2d 735, ¶ 1.

{¶ 4} This court summarized the facts underlying Briscoe's convictions in the direct appeal of his codefendant, Richard Segines. *State v. Segines*, 8th Dist. Cuyahoga No. 89915, 2008-Ohio-2041. The trial transcript is not in our record on appeal, so we accept as true the evidence as set forth in *Segines*. In 2006, Briscoe, Segines, and Briscoe's girlfriend, Sharon Dockery, drove Dockery's Ford Escort to an apartment complex. *Id.* at ¶ 4. Briscoe instructed Dockery to park and wait in the vehicle, and he and Segines left. *Id.* A maintenance worker at the apartment testified that "two men, one of whom he identified as Briscoe, approached Ali Th Abu Atiq[,] who was selling clothing apparel from his van." *Id.* at ¶ 5. Five minutes later, the maintenance worker "received a call that the man near the van had been shot. He ran to the area and observed Ali Th Abu Atiq[,] who was struggling to

breathe and died a short time later from the wound which perforated his lung and caused him to bleed to death." *Id.*

{¶ 5} Briscoe and Segines took "clothing, a set of keys, the victim's cell phone, and over $200 in cash, and then fled to Dockery's vehicle, pounded on the window, and demanded that she unlock the doors." *Id.* at ¶ 6. Dockery testified that she noticed that Segines was holding a gun, t-shirts, and jeans, and that Briscoe was holding a cell phone that was not his. *Id.* Dockery stated that Segines "fought with the man[,] and Briscoe then jumped in and hit him in the head and the gun discharged." *Id.*

{¶ 6} A resident of the apartment building "observed a man being shot and observed two assailants. He then noticed a woman in a gray Ford Escort pulling out. He attempted to warn her to stay out of the area then noticed the two assailants get into her vehicle." *Id.* at ¶ 7.

{¶ 7} Briscoe "ordered Dockery to drive away quickly," and Dockery testified that during the drive, Segines "told Briscoe that he thought Briscoe had killed Ali Th Abu Atiq. Briscoe denied doing so but stated that he had obtained about $10 and a cell phone." *Id.* at ¶ 8. Segines said he had $200 and a set of keys, he divided the money between him and Briscoe, they threw the keys and phone out of the car window, and Segines changed his shirt. *Id.* Dockery noticed a police car behind her, so she parked the vehicle in a driveway of a home in Cleveland, and she and Briscoe pretended to ask for directions. *Id.* at ¶ 9. A witness testified that on the day of the shooting, a woman and two men — whom he later identified as

Dockery, Segines, and Briscoe — came to his house and asked him for directions. *Id.* at ¶ 11. He testified that he "saw the handle of a gun inside the car and asked them to leave." *Id.* Dockery and Segines then "left on foot while Briscoe drove off in the vehicle." *Id.* at ¶ 12.

{¶ 8} A police officer testified that after the shooting, he "was on the lookout for a gray Ford Escort and later that afternoon observed such a vehicle in Garfield Heights and noticed the occupants, one woman and two men, handling clothing. He ran the plates and learned that it belonged to Dockery." *Id.* at ¶ 10. The officer "followed the vehicle but could not stop it," "a shirt was recovered near the home where the vehicle was briefly parked," and DNA on the shirt matched Segines's DNA. *Id.* The officer later found the vehicle abandoned in Cleveland, and fingerprints recovered from the vehicle "were linked to" Segines and Briscoe. *Id.*

{¶ 9} Police learned during the investigation that "the keys were missing from Ali Th Abu Atiq's van[,] and there was no money in his possession. A shell casing was recovered from beneath the van[,] a bullet was found within the van[,] and there were latent fingerprints on the outside of the van. One of the prints was matched to Briscoe." *Id.* at ¶ 15.

{¶ 10} In 2012, after a direct appeal of his convictions and sentence, Briscoe filed a motion for a new trial, which the trial court denied. Briscoe filed an appeal, and this court affirmed the trial court's judgment in *State v. Briscoe*, 8th Dist. Cuyahoga No. 98414, 2012-Ohio-4943, ¶ 18. We explained that Briscoe had argued that he was entitled to a new trial based on newly discovered evidence "in the form

of a letter" that "partially criticizes the quality of fingerprint evidence offered by the prosecutor." *Id.* at ¶ 4. He maintained that his trial counsel was ineffective for not introducing this letter as evidence at trial. *Id.* at ¶ 9. This court found that Briscoe's argument was outside the scope of his assigned error and was nonetheless barred by res judicata because he could have raised this argument on direct appeal. *Id.* at ¶ 9-13.

{¶ 11} In 2014, Briscoe filed a "motion for final appealable order," the state filed an opposition, and the trial court denied the motion. In 2018, Briscoe filed a motion to modify the collection of court costs, the state filed a response, and the trial court denied the motion, instructing him to modify his filing to include a written verification of his community-service hours. In 2019, Briscoe filed another motion to modify the collection of court costs, which the state did not oppose. The trial court granted the motion and granted Briscoe 355 community-service hours.

{¶ 12} In March 2021, Briscoe filed (1) a motion to conduct an evidentiary hearing, (2) a motion for leave to file a delayed motion for a new trial, (3) a motion for a new trial, (4) a motion "for retesting of fingerprint evidence," (5) a motion for the appointment of counsel, and (6) a motion for leave to proceed in forma pauperis.

{¶ 13} In his motion for leave to file a delayed motion for a new trial, and in his accompanying motion for a new trial, Briscoe argued that he had obtained new evidence that the state had prevented him from timely discovering. Specifically, he maintained that he had received from a public record request a police report containing a statement from Dave Palsey, who was at the apartment complex the

day of the shooting. Briscoe argued that the state built its case against him and Segines on the statements of two individuals who were at the apartment complex the day of the shooting and who said that they saw two "suspicious" black males. Briscoe maintained that Palsey stated that he did not see the "suspicious" black males, and this statement "impeaches that of the other two" and corroborates Briscoe's defense that he was "nowhere near the crime scene." In his motion for an evidentiary hearing, Briscoe sought a hearing regarding whether he was unavoidably prevented from obtaining Palsey's statement.

{¶ 14} In support of his motion for leave to file a delayed motion for a new trial, Briscoe attached a police report dated September 13, 2006, which contained the "witness/victim statement" of Palsey and the two other individuals who were at the apartment complex on the day of the shooting. One of them stated that he "saw [two] black males looking suspicious," that they were "not familiar" in the apartment complex, and that he had "never" seen them before. Another individual stated that he saw one "black male [who was] 20 or 25 years old" and another male who had a "thin build" and "brown skin[.]" He said they were "suspicious," that they were "not familiar," and that he had "never seen them before." Palsey stated that he "did not see the [two] suspicious males that" the other two witnesses had seen.

{¶ 15} In his motion "for retesting of fingerprint evidence," Briscoe argued that the fingerprint evidence presented at trial, purportedly tying him to the offenses, "is suspect at best." He maintained that the state refused to produce the

"actual prints" at trial, and before trial, his counsel consulted a fingerprint expert who "called into question" the initial fingerprint "testing."

{¶ 16} The state did not file oppositions to Briscoe's motions. In April 2021, the trial court denied all of Briscoe's motions without an opinion.

{¶ 17} Briscoe timely appealed the trial court's judgments denying all six of his motions. However, his assignments of error pertain only to the judgments denying his motion for leave to file a delayed motion for a new trial and his motion to retest fingerprint evidence.

II. Motion for Leave to File a Delayed Motion for a New Trial

{¶ 18} In his first assignment of error, Briscoe argues that the trial court erred in denying his motion for leave to file a delayed motion for a new trial without first conducting an evidentiary hearing. In his second assignment of error, he contends that the trial court erred in denying his motion for leave to file a delayed motion for a new trial because he clearly established that he was unavoidably prevented from obtaining the police report containing Palsey's statement within 120 days of the jury verdict. We will address these assignments of error together for ease of discussion.

{¶ 19} 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 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).

{¶ 20} 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 was unavoidably prevented from discovering the evidence upon which he must rely. Crim.R. 33(B).

{¶ 21} To file a motion for new trial based on evidence that was discovered beyond the 120 days prescribed in Crim.R. 33, a petitioner must first file a motion for leave to file a delayed motion for new trial. In it, the petitioner must show by "clear and convincing proof that he [or she] has been unavoidably prevented from filing a motion in a timely fashion." *Id.* at ¶ 27, quoting *State v. Morgan*, 3d Dist. Shelby No. 17-05-26, 2006-Ohio-145, ¶ 9. Clear and convincing proof "is that measure or degree of proof [that] is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' * * * and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 22} With respect to whether the trial court should hold an evidentiary hearing on a motion for leave to file a delayed motion for new trial, Ohio courts recognize that

> [a] trial court's decision "whether to conduct an evidentiary hearing on a motion for leave to file a motion for a new trial is discretionary and not mandatory." *State v. Cleveland*, 9th Dist. [Lorain] No.

> 08CA009406, 2009-Ohio-397, ¶ 54. A criminal defendant "is only entitled to a hearing on a motion for leave to file a motion for a new trial if he submits documents which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *Id.*, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 7, 869 N.E.2d 77 (2d Dist.). Thus, "no such hearing is required, and leave may be summarily denied, where neither the motion nor its supporting affidavits embody prima facie evidence of unavoidable delay." *State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893, ¶ 23.

State v. Ambartsoumov, 10th Dist. Franklin Nos. 12AP-878 and 12AP-877, 2013-Ohio-3011, ¶ 13.

{¶ 23} Briscoe argues that the trial court abused its discretion when it denied his motion for leave to file a delayed motion for new trial without an evidentiary hearing because he proved that he was unavoidably prevented from discovering Palsey's statement. We must therefore determine whether the police report containing Palsey's statement on its face clearly and convincingly demonstrates that Briscoe was unavoidably prevented from timely discovering the statement.

{¶ 24} A party is "'unavoidably prevented'" from discovering evidence "'if the party had no knowledge of the existence of the grounds supporting the motion'" and could not have learned of that existence in the exercise of reasonable diligence within the time prescribed by the relevant 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.

{¶ 25} Briscoe relies on *State v. Buehner*, 8th Dist. Cuyahoga No. 106319, 2018-Ohio-4432, for the principle that a withheld police report "establishes that the

defendant was, in fact, unavoidably prevented from obtaining the evidence[.]" In *Buehner*, the defendant appealed the trial court's denial of his motion for leave to file a delayed motion for a new trial based on an exculpatory witness statement in a police report that the state failed to disclose in discovery. *Id.* at ¶ 19. This court reversed, finding that the defendant was unavoidably prevented from discovering the existence of the police report and the content of the witness statement. *Id.* at ¶ 30. We explained that the state indicated in a discovery response that no exculpatory material was available, defense counsel then filed a motion specifically requesting any statements by the witness at issue, and the state responded that no such statements existed. *Id.* at ¶ 23-24. The state argued that the defendant could have filed a public records request, but we found that the defendant would have "had no reason to believe that a request for exculpatory evidence made within 120 days after the verdict would produce a different result from the very same request made prior to trial[.]" *Id.* at ¶ 25.

{¶ 26} Unlike in *Buehner*, we have no facts in the record before us that support Briscoe's claim that the state withheld Palsey's statement. Briscoe submitted no affidavits or other evidence to show that the state failed to produce Palsey's statement in discovery. *See State v. Gray*, 8th Dist. Cuyahoga No. 107394, 2019-Ohio-1638, ¶ 14 (finding that the defendant did not provide clear and convincing evidence that he was unavoidably prevented from discovering new evidence and noting that "[n]o affidavit has been provided by trial counsel[.]"). The police report containing Palsey's statement, dated September 2006, does not on its

face clearly and convincingly demonstrate that Briscoe was unavoidably prevented from timely discovering the statement.

{¶ 27} Briscoe also argues that the trial court abused its discretion when it denied his motion without any discussion or findings. However, we have previously found that a trial court is not required to issue findings of fact and conclusions of law when denying without a hearing a motion for leave to file a delayed motion for new trial. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 26 (8th Dist.).

{¶ 28} Accordingly, we find that the trial court did not abuse its discretion in denying Briscoe's motion for leave to file a delayed motion for a new trial without an evidentiary hearing. We overrule Briscoe's first two assignments of error.

III. Motion to Retest Fingerprint Evidence

{¶ 29} In his third assignment of error, Briscoe argues that the trial court erred in denying his motion to retest fingerprint evidence because he demonstrated irregularities in the initial fingerprint testing. He maintains that before trial, his counsel consulted a fingerprint expert who authored a report calling into question the quality of the fingerprint evidence linking Briscoe to the offenses. Briscoe contends that if the jury knew about the irregularities with the fingerprint evidence, combined with Palsey's witness statement, he would have been acquitted.

{¶ 30} Briscoe's request to retest fingerprint evidence is barred by the doctrine of res judicata. "It is well recognized that the doctrine of res judicata bars claims that were raised or could have been raised on direct appeal." *State v. Fountain*, 8th Dist. Cuyahoga Nos. 92772 and 92874, 2010-Ohio-1202, ¶ 9, citing

State v. Davis, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. Briscoe challenged the fingerprint evidence in his 2012 postconviction motion, arguing that he was entitled to a new trial and his trial counsel was ineffective for not introducing at trial the letter from the fingerprint expert. As we explained in Briscoe's appeal from the trial court's denial of that motion, the "proper avenue" for Briscoe to raise these arguments was in his direct appeal, and the doctrine of res judicata prevents him from raising the issue now. *Briscoe*, 8th Dist. Cuyahoga No. 98414, 2012-Ohio-4943, at ¶ 13.

{¶ 31} Accordingly, we overrule Briscoe's third assignment of error.

{¶ 32} Judgments 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.

MARY J. BOYLE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES A. BROGAN, J.,* CONCUR

*(Sitting by assignment: James A. Brogan, J., retired, of the Second District Court of Appeals)