[Cite as *State v. Vinson*, 2012-Ohio-3421.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-172**
- vs -	:	
HORACE K. VINSON, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000099.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P. O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

John W. Hawkins, Parkhill Professional Building, 35104 Euclid Avenue, Suite 101, Willoughby, OH 44094 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Horace K. Vinson, Jr., appeals from a judgment of the Lake County Court of Common Pleas, which denied his "Notice and Motion for a Finding re: a New Trial." Mr. Vinson requests a new trial, for his murder conviction in 2006 for killing Michael Rush, on the ground that the trial court improperly instructed the jury on the elements of self-defense. This is his second attempt at obtaining a new trial and his third appeal before this court. In his previous appeals he claimed the trial court erred in prohibiting

evidence that would have established his claim of self-defense. In his latest attempt, he claims the trial court erred in instructing the jury on the elements of self-defense. To circumvent the time limit for requesting a new trial, he claims he was unavoidably prevented from filing the motion for a new trial because he was not in possession of the jury instructions portion of the trial transcript until 2011, even though the instructions have been a part of the record since his direct appeal in 2006. Moreover, a delayed motion for a new trial is not a proper vehicle for raising an issue regarding the jury instructions, because those instructions were read in open court in his presence and the transcript was available to him since the trial, as early as his direct appeal. Thus, we must affirm the judgment of the trial court.

Substantive Facts and Procedural History

{¶2} After a jury trial, Mr. Vinson was convicted of the murder of Michael Rush, with a firearm specification, and also of carrying a concealed weapon. Before sentencing, he moved for a new trial. The trial court denied his motion, and sentenced him to a term of 15 years to life for murder, a consecutive three-year term for the firearm specification, and a consecutive 18-month term for carrying a concealed weapon. We affirmed the trial court's judgment, in *State v. Vinson*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199 ("*Vinson I*"). Mr. Vinson also filed a petition for postconviction relief, and we affirmed the trial court's decision denying it, in *State v. Vinson*, 11th Dist. No. 2007-L-088, 2008-Ohio-3059 ("*Vinson II*"), appeal not accepted, 120 Ohio St.3d 1453, 2008-Ohio-6813.

{¶3} Mr. Vinson's conviction stemmed from an altercation with the victim outside of Mr. Vinson's father's home, where Mr. Vinson resided at the time. Mr.

Vinson's then-fiancé and the mother of his infant child, Jennifer Gedeon, had become romantically involved with Mr. Rush. On the day of the incident, Ms. Gedeon announced to Mr. Vinson she was leaving him for Mr. Rush and "someone" was coming to pick her up shortly. Mr. Rush then arrived at Mr. Vinson's father's house, backed his vehicle up into the driveway, and started to load Ms. Gedeon's belongings with her help. Upon seeing this, Mr. Vinson went to his father's closet, retrieved a gun, and loaded it with bullets. He then went to the front door and yelled, "Hey nigger, get off my lawn." The two made fighting gestures toward each other. Mr. Vinson also picked up a rock and threw it at Mr. Rush's vehicle. According to Mr. Vinson, Mr. Rush then attempted to pull a gun out of his waistband but dropped it; when Mr. Rush crouched down to retrieve it, their eyes met, and Mr. Vinson became fearful for his life. Mr. Vinson then pulled out the gun concealed underneath his sweatshirt, and started shooting. He fired four shots in rapid succession. The sole witness to the event saw Mr. Rush running away from Mr. Vinson with his arms down by his side, and fell down three houses down the street. Mr. Vinson was seen standing on the front lawn with a smoking gun. *Vinson I* at ¶9-14; *Vinson II* at ¶7-11.

Direct Appeal and Postconviction Relief

{¶4} In his direct appeal, Mr. Vinson raised four assignments of error for our review: (1) his counsel provided ineffective assistance of counsel in failing to call his fiancé and his father to testify on his behalf, (2) the trial court erred in excluding evidence about his knowledge of the victim which led him to be fearful for his life, (3) the trial court erred in denying him a new trial, and (4) the trial court erred in admitting certain testimony of the manager of the housing complex, where he and the victim had

both resided. All of these claims involved evidentiary issues pertaining to Mr. Vinson's claim of self-defense. As we noted, to establish self-defense, a defendant must prove the following elements: (1) the defendant was not at fault in creating the situation giving rise to the affray; (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm, and his only means of escape from such danger was through the use of such force; and (3) the defendant did not violate any duty to retreat or avoid the danger. *Vinson I* at ¶123.

{¶5} Regarding the ineffective assistance of counsel claim, we determined his trial counsel had good cause for not calling these witnesses, because these witnesses, in their interviews with the police, contradicted Mr. Vinson's testimony. For the exclusion of evidence claim, Mr. Vinson argued the trial court should have admitted evidence regarding his knowledge of the victim's character, which he argued would have established his fearful state of mind. We rejected his contention. *Vinson I* at ¶64-66. Regarding his motion for a new trial, he argued he was prevented from introducing certain reputation and opinion testimony and specific instances of conduct regarding the victim's character. We rejected his claim, explaining that a defendant asserting self-defense cannot introduce evidence of specific instances of a victims conduct to prove that the victim was the initial aggressor. *Vinson I* at ¶84. Regarding the trial court's admission of a witness's statement that the victim "was very nice," which the witness made upon a question by the prosecutor, we noted the question was withdrawn by the prosecutor, and, even if the court erred, the error would be harmless because the evidence was overwhelmingly in favor of Mr. Vinson's guilt as he had failed to establish a valid claim of self defense. We emphasized that, in order to establish self-defense,

Mr. Vinson was required to prove that he was not the initial aggressor, which he clearly failed to do. *Id*. at ¶123.

{¶6} In his petition for postconviction relief, Mr. Vinson alleged, as he did in his direct appeal, that his trial counsel provided ineffective assistance for failing to call his fiancé and his father to the stand. He claimed that if these witnesses were presented, he would have established his affirmative defense of self-defense, and he attached their affidavits to his petition. We affirmed the trial court's decision denying the petition, noting that these affidavits contained further contradictions between their previous grand jury testimonies and police interviews, and therefore, provided no evidentiary support for his claim. *Vinson II* at ¶36.

Motion for A Finding of Unavoidable Delay

{¶7} On November 4, 2011, Mr. Vinson filed the instant motion asking the trial court to make a finding that he was unavoidably prevented from filing the motion for a new trial pursuant to Crim.R. 33(B). He attached his own affidavit to support his request.

{¶8} In the affidavit, Mr. Vinson stated that substantial evidence established he was standing on the concrete pad in front of his front door to prevent Michael Rush from entering his home to take his infant son, and that he shot Rush when Rush approached his home threatening to kill him. Mr. Vinson stated he did not understand the trial court's jury instructions and that the trial transcript his trial counsel provided him did not include the jury instructions; as a result, he did not read about the jury instructions regarding a duty to retreat being an element of self-defense until September 2011. He asked the trial court to find that he was unavoidably prevented from filing the motion for

a new trial, based on the delay in having access to the jury instructions portion of the trial transcript. His motion, however, did not articulate why a new trial would be warranted because of the allegedly improper jury instructions.

{¶9} The trial court denied the motion without a hearing, finding he failed to demonstrate by clear and convincing evidence that he was unavoidably prevented from filing a motion for a new trial timely.

{¶10} Mr. Vinson appeals from that judgment, raising the following assignment of error:

{¶11} "The trial court committed prejudicial error when it denied the motion of Defendant-Appellant for a Finding Re Unavoidable Delay when the trial court found that Defendant-Appellant had failed to demonstrate by clear and convincing proof that he was unavoidably prevented from filing his motion within time period specified in Rule 33 of the Ohio Rules of Criminal procedure after the verdict was rendered because the Defendant-Appellant was represented by competent counsel at trial."[1]

Standard of Review

{¶12} A Crim.R. 33 motion for a new trial is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Schrock*, 11th Dist. No. 2004-L-056, 2005-Ohio-4040, ¶7, citing *State v. Laveck*, 11th Dist. Nos. 2002-L-189, 2003-L-122, 2005-Ohio-62.

{¶13} The term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*,

1. After the state filed its appellee brief, Mr. Vinson requested leave to file a reply brief, which we granted.

112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

Crim.R. 33 Motion for New Trial and Requirements for Delayed Motion New Trial

{¶14} Crim.R. 33 provides the following:

{¶15} "(A) Grounds.

{¶16} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶17} "(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;

{¶18} "(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶19} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶20} "(4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *;

{¶21} "(5) Error of law occurring at the trial;

{¶22} "(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. * * *.

{¶23} "(B) Motion for new trial; form, time.

{¶24} "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 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.

{¶25} "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."

{¶26} Thus, Crim.R. 33 permits a convicted defendant to file a motion for a new trial within 14 days if the ground for a new trial is one of those set forth in Crim.R. 33 (A)(1)-(5), or within 120 days if the request is based on "newly discovered evidence." The defendant must first seek leave to file a delayed motion for a new trial. *State v. Mathis*, 134 Ohio App.3d 77 (1999). A trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay. *State v. Lanier*, 2d Dist. No. 2009 CA 84, 2010-Ohio-2921, ¶17.

{¶27} A defendant is "unavoidably prevented" from filing a motion for new trial if the defendant "had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *State v. Walden*, 19 Ohio App.3d 141, 145-146 (10th Dist.1984); *State v. Lake*, 5th Dist. No. 2010 CA 88, 2011-Ohio-261, ¶37.

{¶28} Moreover, no 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. No. L-10-1035, 2010-Ohio-5893, ¶23, citing *Lanier* at ¶22; *State v. Clumm*, 4th Dist. No. 08CA32, 2010-Ohio-342, ¶28; *State v. Bush*, 10th Dist. No. 08AP-627, 2009-Ohio-441, ¶12; *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶21 (2d Dist.); *State v. Norman*, 10th Dist. No. 04AP-1312, 2005-Ohio-5087, ¶9.

{¶29} Mr. Vinson did not specify in his "Notice and Motion for a Finding re: a New Trial" the ground for his motion for a new trial. However, since he only alleged a delay in obtaining the jury instructions portion of the trial transcript, it would appear the ground for his request for a new trial is one of the grounds set forth in Crim.R. 33(A)(1)-(5), rather than "newly discovered evidence" set forth in Crim.R.33(A)(6).

{¶30} Regarding a motion for a new trial based on one of the grounds in Crim.R.33(A)(1)-(5), a defendant must file the motion within 14 days after the verdict was rendered, unless the trial court found the defendant was unavoidably prevented from filing his motion for a new trial by clear and convincing evidence. Crim.R. 33(B). Clear and convincing evidence is that measure of proof that is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt in

criminal cases; clear and convincing evidence produces in the mind of the fact finder a firm belief or conviction as to the facts sought to be established. *State v. Schiebel*, 55 Ohio St.3d 71 (1990).

{¶31} This is Mr. Vinson's second attempt to obtain a new trial. He filed his first motion for a new trial before he was sentenced, arguing he should be permitted to introduce evidence to demonstrate his state of mind in support of his self-defense claim. He now attempts to file a second motion for a new trial on the ground that the trial court improperly charged the jury regarding self-defense, in particular, regarding an offender's duty to retreat. To circumvent the time requirement for the motion for a new trial, he claims he did not have access to the jury instructions portion of the trial transcript until September 2011.

{¶32} In order to show that he was "unavoidably prevented" from filing a motion for a new trial, Mr. Vinson must show he "had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *Walden*, *supra*.

{¶33} First, Mr. Vinson was present with counsel at the trial, and therefore, was presumed to have heard the instructions given to the jury. He could not plausibly claim that he had no knowledge of the existence of the purportedly improper jury instructions, or that he could not have learned of their existence. He alleges in his affidavit that he did not understand the jury instructions; however, he was required to exercise reasonable diligence and ensure that he understood them, through the assistance of counsel, which was fully available to him.

{¶34} Second, Mr. Vinson filed a direct appeal and a petition for postconviction relief, both with the assistance of appellate counsel. The jury instructions portion of the trial transcript, including the instructions on self-defense, have been part of the record since his direct appeal in 2006. Mr. Vinson's self-serving affidavit that he did not have the jury instructions to review until 2011 does not constitute clear and convincing evidence that he was unavoidably prevented from filing the motion for a new trial on the ground of improper jury instructions. Because the motion and the supporting affidavit do not embody prima facie evidence of unavoidable delay, the trial court did not abuse its discretion in summarily denying his motion. *Peals*, *supra*.

{¶35} Finally, we note that even if the motion for a new trial were not untimely, a claim alleging improper jury instructions would have been barred by res judicata. "[A] final judgment of conviction bars the convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175 (1967). The issue regarding the propriety of jury instructions could have been raised on direct appeal, but it was not, and would therefore be barred by res judicata.

{¶36} A delayed motion for a new trial is not a proper vehicle for raising an issue regarding jury instructions, because, by its very nature, the ground supporting the motion would have been in existence since the trial and a defendant could have learned of the existence in the exercise of reasonable diligence. *Walden*, *supra*. Mr. Vinson's assignment of error is without merit.

{¶37} The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.