[Cite as *State v. Alexander*, 2012-Ohio-4468.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0120**
- vs -	:	
RICKEY ALEXANDER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 92 CR 605.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Rickey Alexander, pro se, PID: A281461, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Rickey Alexander appeals from a judgment of the Trumbull County Court of Common Pleas which denied his motion for leave to file a delayed motion for a new trial. Mr. Alexander was convicted of aggravated murder and aggravated robbery in 1993. His request for leave to file a delayed motion for a new trial was based on a recanting affidavit of one of the state's witnesses. For the following reasons, we affirm the trial court's judgment.

Substantive Fact and Procedural History

{¶2} In the early morning of September 4, 1992, Anthony Borden was found shot to death next to his vehicle in the parking lot of the Niles Road Fruit Market in Howland Township. Mr. Alexander and Leon Stubbs were indicted and eventually convicted for the crime after separate jury trials. Mr. Alexander was found guilty in August 1993 and given a life sentence with 30 years of actual incarceration on the aggravated murder charge, consecutive to a 10-to 25-year sentence on the aggravated robbery charge, and a three-year sentence on a firearm specification, also to run consecutively. Mr. Alexander appealed his conviction, and this court affirmed it, in *State v. Alexander*, 11th Dist. No. 93-T-4948, 1996 Ohio App. LEXIS 5418 (Nov. 29, 1996), appeal not accepted, 78 Ohio St.3d 1452 (1997). Mr. Alexander has since been serving his sentence in the Lake Erie Correctional Institution.

{¶3} On November 8, 2011, Mr. Alexander filed, pro se, the instant "Motion for Leave to File Delayed Motion for New Trial" pursuant to Crim.R. 33(A). He also filed an affidavit by Lyndall Kimble, dated October 5, 2011, who was one of the state's witnesses at his trial. Mr. Kimble himself was convicted of drug offenses and sentenced to a ten-and-a-half-year prison term in an unrelated case in 2005. In 2006, he arrived at the Lake Erie Correctional Institution, where Mr. Alexander was also serving his sentence.

{¶4} In his Crim.R. 33 affidavit, Mr. Kimble stated that he often saw Mr. Alexander walking around the prison compound, that he has been "overcome with guilt" for the role he played in Mr. Alexander's conviction, and that he "recently" approached Mr. Alexander and offered to recant his testimony. Mr. Kimble stated he lied when he

testified at Mr. Alexander's trial that Mr. Alexander told him he shot Anthony Borden. He stated he made the false statement to help Leon Stubbs, but did not explain why his perjury at Mr. Alexander's trial could have helped Stubbs, since Stubbs was already found guilty of aggravated murder and aggravated robbery in a separate jury trial several weeks before Mr. Alexander's own trial began.[1]

{¶5} The trial court denied Mr. Alexander's motion for leave to file a delayed motion for a new trial, on the ground that he was not unavoidably prevented from discovering the purported new evidence. On appeal, Mr. Alexander raises the following assignments of error for our review:

{¶6} "[1.] The trial court committed error when it determined, without an evidentiary hearing, and without review of the trial testimony, that Kimble'[s] recanted testimony would not be 'compelling' and therefore refused to grant leave to file a motion for a new trial."

{¶7} "[2.] The trial court committed error when it determined without an evidentiary hearing, and without review of the trial testimony, that Kimble's recanted testimony would not be admitted because the appellant had prior knowledge of Kimble's intent and therefore refused to grant leave to file a motion for a new trial."

{¶8} Because both assignments of error concern the same underlying issues, we address them together.

Standard of Review

1. *See State v. Stubbs*, 11th Dist. No. 93-T-4986, 1995 Ohio App. LEXIS 1103 (Mar. 24, 1995), for the procedural and substantive facts regarding Leon Stubbs' conviction.

{¶9} 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 and 2003-L-122, 2005-Ohio-62.

{¶10} 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*, 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.

Requirements for a Delayed Motion for New Trial

{¶11} Crim.R. 33(B) provides the following:

{¶12} "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 * * * 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.

{¶13} "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

* * *. 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."

Leave for Delayed Motion for a New Trial

{¶14} Thus, Crim.R. 33 permits a convicted defendant to file a motion for a new trial within 120 days after the day of the verdict on grounds of "newly discovered evidence." However, pursuant to Crim.R. 33, when a motion based on newly discovered evidence is filed more than 120 days after the verdict, the defendant must first file a motion to seek leave to file a delayed motion. *See, e.g.*, *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, ¶24 (7th Dist.); *State v. Grinnell*, 10th Dist. No. 09AP-1048, 2010-Ohio-3028.

{¶15} Leave is granted only where the defendant can show, by clear and convincing evidence, he was unavoidably prevented from discovering the evidence within the time limit or in a timely fashion. *State v. Roberts*, 141 Ohio App.3d 578 (6th Dist.2001); *State v. Morgan*, 3d Dist. No. 17-05-26, 2006-Ohio-145. "The decision whether to grant or hold an evidentiary hearing on a defendant's request for leave to file a delayed motion for new trial falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." (Citations omitted.) *State v. Peals*, 6th Dist. No. L-10-1035, 2010-Ohio-5893, ¶23.

{¶16} 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).

Unavoidable Delay

{¶17} 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.

{¶18} The case law has not provided a clear guidance as to what is required of an appellant in order to show unavoidable delay, when the newly discovered evidence is a recantation of trial testimony. Some courts have held that a defendant is entitled to an evidentiary hearing on the issue of unavoidable delay if the defendant's motion for leave includes documents that "on their face" support the defendant's claim that he was unavoidably prevented from timely discovering the evidence. *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181 (2d Dist.2007); *State v. York*, 2d Dist. No. 99-CA-54, 2000 Ohio App. LEXIS 550 (Feb. 8, 2000). In these Second District cases, the appellant presented a recanting affidavit from a trial witness, and the court held that because the affidavit on its face supported a claim of unavoidable delay, the appellant would be entitled to a hearing on the issue of unavoidable delay.

{¶19} Following these cases, therefore, it would appear that the trial court, before denying the motion for leave to file a delayed motion, should have held a hearing to determine whether there is unavoidable delay in the motion for a new trial filed by an

appellant in the position of Mr. Alexander, who presented a recanting affidavit showing the witness decided to recant his testimony beyond the 120-day period. As such, an appellant would have no control over the time when the witness decided to "do the right thing," and thus could not have learned of the existence, even in the exercise of reasonable diligence, the affidavit "on its face" would support unavoidable delay, and a hearing should be held to further develop the record and determine the issue.

{¶20} As to what type of evidence is required to show unavoidable delay, at least one court suggested that the appellant should present the following evidence for the trial court's consideration: "when or why the affiants decided to recant their trial testimony, whether appellant played a role in that decision, or whether and at what point appellant learned of their willingness to come forward with the new testimony." *Peals*, *supra*, at 24.

{¶21} Here, the trial court overruled Mr. Alexander's motion for leave to file a motion for a new trial as untimely, without holding a hearing to further inquire into the circumstances of the witness's recantation. Pursuant to the case law cited in the forgoing, this would have been an abuse of discretion. We recognize requiring a hearing on the issue of unavoidable delay whenever an appellant produces a recanting affidavit after 120 days places additional burdens on the trial courts, and, in most cases, the requirement may appear to elevate form over substance. However, we believe such a procedural requirement is necessary so that a genuine recantation that could be outcome determinative is not foreclosed only because the recanting witness decides to "do the right thing" belatedly.

{¶22} Under the circumstances of this case, however, the trial court's denial of Mr. Alexander's motion for leave to request a new trial was harmless, because, even if the trial court were to grant leave and consider his motion for a new trial, the evidence in the record is such that the trial court would have summarily denied it, and it would not have been improper. In *State v. Hill*, 64 Ohio St.3d 313 (1992), the only newly discovered evidence was a recanting affidavit and the trial court denied it without a hearing. The court approved of the trial court's ruling, because, "even with the recantation affidavit, the result of the defendant's trial would not have been different." *Hill* at 333, citing *State v. Duling*, 21 Ohio St.2d 13 (1970).

{¶23} The trial court would have, properly, denied Mr. Alexander's request for a new trial if it were to consider it. This is because in order "[t]o warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Hawkins*, 66 Ohio St.3d 339, 350 (1993).

{¶24} More specifically, when a defendant moves for new trial based upon grounds of newly discovered evidence consisting of a recantation of witness trial testimony, the trial court must make two findings: "(1) which of the contradictory testimonies of the recanting witness is credible and true, and if the recantation is believable; (2) would the recanted testimony have materially affected the outcome of the

trial?" *State v. Rossi*, 2d Dist. No. 24740, 2012-Ohio-2545, ¶17, quoting *City of Toledo v. Easterling*, 26 Ohio App.3d 59 (6th Dist.1985). *See also State v. Nahhas*, 11th Dist. No. 2001-T-0045, 2002-Ohio-3708, ¶18; *State v. Williams*, 2d Dist. 19854, 2004-Ohio-3135. Furthermore, newly discovered evidence which purportedly recants trial testimony is "looked upon with the utmost suspicion and must be viewed with strict scrutiny." *State v. Bradley*, 101 Ohio App.3d 752, 758-59 (8th Dist.1995).

{¶25} Based on the evidence contained in the record, even taking into account Mr. Kimble's recantation of his testimony, Mr. Alexander could not have demonstrated, as required, that the recantation would have "materially affected the outcome of the trial," or that it "discloses a strong probably that it will change the result if a new trial is granted." This is because Mr. Kimble was not the sole witness implicating Mr. Alexander in the murder. There were other witnesses testifying to Mr. Alexander's involvement in the shooting of the victim. Lazarus Stubbs testified that Leon Stubbs said to Mr. Alexander, "I think you killed that man"; and Aaron Warfield testified that Mr. Alexander admitted to him that he killed the victim. Furthermore, the reason offered by Mr. Kimble in his recanting affidavit for lying at the trial – that he lied to protect Leon Stubbs due to the pressure from the Stubbs family – is not entirely believable because Leon Stubbs had already been convicted for his role in the murder and serving time in prison at the time of Mr. Alexander's trial.

Conclusion

{¶26} To conclude, the trial court should have held a hearing on the issue of unavoidable delay, because Mr. Alexander had no control over when the witness decided to recant his trial testimony, and thus could not have learned of that existence

within the prescribed time in the exercise of reasonable diligence; therefore, the recanting affidavit "on its face" supports Mr. Alexander's claim that he was unavoidably prevented from discovering the new evidence within 120 days. The trial court should have held a hearing to inquire into the circumstances of the recantation to determine if Mr. Alexander was indeed unavoidably prevented from discovering the purported new evidence. However, under the circumstances of this case, the recantation would not have materially changed the outcome of this case. For that reason, we affirm. The first and second assignments of error are without merit.

{¶27} The judgment of the Trumbull County Court of Common Pleas is affirmed.

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

THOMAS R. WRIGHT, J., dissents with Dissenting Opinion.

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{¶28} Being unable to agree with the majority, I respectfully dissent.

{¶29} While I agree with the majority's conclusion that the trial court should have held a hearing, I disagree with the majority's conclusion that the failure to hold a hearing was harmless because the trial court would have ruled against appellant on the basis that the recanted testimony would not have materially affected the outcome of the trial. This conclusion is wholly speculative.

{¶30} As the majority correctly states, we review a trial court's decision in cases such as this under an abuse of discretion standard. However, whether the trial court would have concluded that the recanted testimony was credible and if so, whether the

recanted testimony would have materially affected the outcome of the trial is one that a trial court must usually make before we review. In our case, although there is other testimony that *may* lead the trial court to conclude that the outcome of the trial would not have been different, the credibility of the recanting witness in light of all the evidence presented, including the credibility of Lazarus Stubbs and Aaron Warfield, must be known before one could conclude that the result would not have been otherwise. Unlike *Hill,* where the evidence was overwhelming in light of the minor recant, or *Duling,* which involved newly discovered *cumulative* evidence, this is simply not a case where an appellate court can make this initial determination. The trial court is typically in the better place to make this decision, particularly when the judge who presided over the trial remains the judge deciding the motion, as is the case here.

{¶31} For the reason stated, I respectfully dissent and would remand this matter to the trial court to determine which of the contradictory testimonies of the recanting witness is credible and true, and if the recantation is believable, whether the recanted testimony would have materially affected the outcome.