

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-T-0095
ALFONSIA M. PERRY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 94 CR 42.

Judgment: Affirmed.

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

Alfonsia M. Perry, pro se, PID# A300-444, Chillicothe Correctional Institution, P.O. Box 5500, 15802 St. Rt. 104 North, Chillicothe, OH 45601 (Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Alfonsia M. Perry¹, appeals from the September 29, 2014 Judgment Entry of the Trumbull County Court of Common Pleas, denying his Motion for Leave to File for a New Trial and Motion for Judgment on the Pleadings. The issue before this court is whether a motion for leave to file a motion for new trial, based on newly discovered evidence under Criminal Rule 33(A)(6), is timely when filed over

1. We note that, since 2009, Perry has alternatively spelled his name Alfonsia and Alphonsia.

five years after the movant is made aware of the evidence. For the following reasons, we affirm the decision of the court below.

{¶2} In November 1994, Perry was found guilty of Aggravated Murder and sentenced to imprisonment for a determinate period of life. Perry's conviction and sentence have been affirmed in successive appeals. See *State v. Perry*, 11th Dist. Trumbull No. 94-T-5165, 1997 Ohio App. LEXIS 3884 (Aug. 29, 1997) (direct appeal); *State v. Perry*, 11th Dist. Trumbull No. 2008-T-0127, 2009-Ohio-1320 (motion for delayed appeal); *Perry v. McKay*, 11th Dist. Trumbull No. 2009-T-0023, 2009-Ohio-5767 (writ of procedendo); *State v. Perry*, 11th Dist. Trumbull No. 2009-T-0090, 2010-Ohio-713 (motion for new trial); *State v. Perry*, 11th Dist. Trumbull No. 2010-T-0014, 2010-Ohio-2956 (postconviction relief).

{¶3} On March 19, 2014, Perry filed a Motion Requesting Leave to File for a New Trial. The basis for Perry's Motion was that his "conviction rest[ed] exclusively on an 'illegal' autopsy performed by Dr. Cox [the former Summit County Coroner] in determining the cause of death of Jeanette Purdue." According to Perry, Dr. Cox' autopsy of the victim was "illegal" because it was performed in contravention of the statutes defining the authority of county coroners to perform autopsies. R.C. 313.11 et seq. Perry claimed that, while "diligently research[ing] and scour[ing] cases and case law concerning all individuals that were the princip[al] accusers at trial," he "discovered that Dr. Cox had been convicted of performing illegal autopsies which spanned the time period that he himself had been convicted, raising serious questions as to the authenticity of the testimony of Dr. Cox's involvement in his trial."²

2. For the record, Perry testified in his own defense at trial and admitted to beating Purdue to death with bed slats and other objects. *Perry*, 1997 Ohio App. LEXIS 3884, at 4-5.

{¶4} On September 18, 2014, the State filed an Answer in Opposition.

{¶5} On September 22, 2014, Perry filed a Motion for Judgment on the Pleadings, pursuant to Civil Rule 12(C).

{¶6} On September 29, 2014, the trial court denied Perry's Motions on the grounds that he "is unable to establish that he was unavoidably prevented from the discovery of any new evidence in this case and that his filing of the motion was not done within a reasonable time after he discovered the evidence."

{¶7} On October 17, 2014, Perry filed a Notice of Appeal. On appeal, Perry raises the following assignments of error:

{¶8} "[1.] A conviction can not stand where the defendant was denied his rights to a fair trial as guaranteed by the United States Constitution, and the actors perpetrated a fraud upon the court, thusly, any judgment by that court would be deemed void."

{¶9} "[2.] The trial court lacked subject-matter jurisdiction where the indictment found by the grand jury was adduced by incompetent evidence and thusly, makes said indictment invalid and void."

{¶10} "[3.] Defendant's rights to due process were violated where defendant had to stand trial on an indictment which the government knew was based on perjured testimony."

{¶11} "[4.] Appellant submits that the actors in these proceedings can not seek equity because they came into this conviction with unclean hands."

{¶12} "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,” unless “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.” Crim.R. 33(B). “A motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion.” *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus.

{¶13} We find no abuse of discretion in the trial court’s denial of Perry’s Motion Requesting Leave to File for a New Trial. As noted by the trial court, Perry had been aware of Cox’ professional improprieties for years. In various filings from 2008, Perry complained that the former Trumbull County Coroner who testified at his trial did not do so based on personal knowledge of the facts, but, rather, he “only testified to reports written by a forensic scientist, William Cox of Summit County (who later plead guilty to his crimes).” Motion for New Trial, filed October 17, 2008. As a result of Cox’ convictions “of accepting improper compensations,” Perry advised this court that “[h]e lost his employment as a pathologist and pled guilty to unethical misuse of office and violation of public trust.” Notice of Appeal, filed December 1, 2008. *Compare State v. Petrone*, 5th Dist. Stark No. 2013 CA 00213, 2014-Ohio-3395, ¶ 77 (subsequent discovery of disciplinary action against the State’s forensic witness did not constitute “newly-discovered evidence within the meaning of Crim.R. 33”).

{¶14} Assuming, arguendo, that Perry’s indictment and/or conviction were procured by Cox’ fraudulent testimony, his conviction would not, therefore, be rendered void and subject to challenge at any time. No conviction “shall * * * be set aside or reversed on account of any defect in form or substance of the indictment or information,

unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.” R.C. 2941.29; *compare Wireman v. Ohio Adult Parole Auth.*, 38 Ohio St.3d 322, 528 N.E.2d 173 (1988) (denying a writ of habeas corpus, based on the claim that the “judgment of conviction is ‘void’ because all the court officers involved in the prosecution participated in a ‘fraud and conspiracy[,]’” as the claim did not challenge “the jurisdiction of the sentencing court”).

{¶15} Perry’s assignments of error are without merit.

{¶16} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas, denying Perry’s Motion for Leave to File for a New Trial and Motion for Judgment on the Pleadings, is affirmed. Costs to be taxed against the appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O’TOOLE, J.,

concur.