[Cite as *State v. Trimble*, 2016-Ohio-1307.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2015-P-0038**
JAMES E. TRIMBLE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas.
Case No. 2005 CR 00022.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Kathryn L. Sandford*, Supervisor, Death Penalty Division, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9308; *Joseph E. Wilhelm*, Assistant Federal Public Defender, Capital Habeas Unit, Skylight Office Tower, 1660 West Second Street, Suite 750, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, James E. Trimble, appeals from the May 1, 2015 judgment entry of the Portage County Court of Common Pleas, overruling his motion for leave to file a motion for new trial. For the reasons that follow, the judgment of the trial court is reversed, and the case is remanded for proceedings consistent with this opinion.

{¶2} On January 21, 2005, appellant, armed with an assault rifle, murdered his girlfriend, Renee Bauer, and her seven-year-old son at the couple's home in Ravenna, Ohio. Appellant then fled through a wooded area in his neighborhood. At around 11:30 p.m., appellant broke through a patio door at the home of Kent State University student Sarah Positano. Appellant took Ms. Positano hostage and ordered her to call the police. The hostage situation ended when appellant shot and killed Ms. Positano, followed by several hours of gunfire exchange between appellant and law enforcement. In the morning of January 22, 2005, appellant was taken into custody by SWAT officers.

{¶3} On October 25, 2005, appellant was found guilty by a jury of three counts of aggravated murder and accompanying specifications, three counts of kidnapping, one count of aggravated burglary, and two counts of felonious assault. The jury recommended the death sentence be imposed, and on November 8, 2005, the trial court sentenced appellant to death for the aggravated murders of Renee Bauer, her son, and Sarah Positano. Appellant's sentence was affirmed on direct appeal by the Ohio Supreme Court. *State v. Trimble,* 122 Ohio St.3d 297, 2009-Ohio-2961.

{¶4} While his direct appeal was pending, appellant filed a petition for postconviction relief on May 27, 2007. The trial court denied appellant's petition. This court affirmed the trial court's decision in *State v. Trimble*, 11th Dist. Portage No. 2007-P-0098, 2008-Ohio-6409.

{¶5} Over five years later, on August 29, 2013, appellant filed a "Motion for Leave to File New Trial Motion." His motion for leave was accompanied by a memorandum in support. Attached to appellant's memorandum in support were two e-mails and a response to a public records request. The first e-mail was dated December

31, 2012. It was sent by former Portage County Deputy Sheriff Michael Muldowney to Dennis Day Lager, Chief of Portage County Public Defender's Office. The e-mail stated:

> [O]n or about October/November 2005/2006, I [Michael Muldowney] learned that a Rogue SWAT Officer was in Sara Positano duplex during the 2hr cool off period.
>
> On or about October/November, of 2005/2006, I communicated what I learned and my concerns to then, Chief David Doak, of the Portage County Sheriff Office.
>
> Approximately 3 years later, on or about, January 2009, I had a second conversation with Dave Doak as Portage County's newly elected Sheriff—reference the rogue officer * * *.
>
> To date, I have no information on whether the information I passed on to Dave Doak went anywhere. I am reaching out to you—to make sure certain information about the Trimble case are known, so Justice can be served.

{¶6} The second e-mail attached to appellant's memorandum in support was dated July 15, 2013, and sent by Mr. Muldowney to Mark Rooks of the Office of the Ohio Public Defender. That e-mail stated:

> I [Michael Muldowney] have reached out the best way I can to the County and Ohio Public Defenders Office with my e-mail—reference the Trimble case. Please let the Lawyers know that I want to move forward and be part of the process but I cannot move forward without receiving a subpoena first etc.

{¶7} Appellant's memorandum argues that he did not purposely cause Ms. Positano's death. Instead, appellant asserts the presence of law enforcement officers inside the residence caused appellant to accidentally shoot Ms. Positano. The record reflects this assertion was first made by appellant when he voluntarily gave a statement to law enforcement shortly after his arrest. He explained in detail how he saw an officer

crawling across the living room floor and fire a weapon at him, which caused him to accidentally shoot Ms. Positano.

> Trimble said he went to Positano's residence because he 'just kept running through the woods and that's where [he] ended up.' Trimble claimed that he shot Positano after the police entered the residence. He said, 'I had the hammer cocked and the police came in the house and I turned to look at them and [the gun] went off.' According to Trimble, the police entered the residence and then left: 'They fired one shot, I fired a couple of shots. They * * * fired a couple of more shots before they went out the door.' Trimble said, 'I didn't pull the trigger,' and 'I didn't mean to shoot her.'

Trimble, 2009-Ohio-2961, ¶27.

{¶8} This statement was before the jury and, presumably, is what prompted the trial court to instruct on the lesser-included offense of involuntary manslaughter. *See id.* at ¶185. However, appellant's version of events was uncorroborated and ultimately rejected by the jury. Appellant argues that this new evidence, i.e., Mr. Muldowney's emails, corroborates appellant's version of events and "impeaches prosecution witnesses who claimed that law enforcement did not enter Positano's house during the standoff."

{¶9} Appellee, the state of Ohio, filed a response to appellant's motion for leave, arguing appellant failed to show by clear and convincing evidence that he was unavoidably prevented from discovering the evidence he seeks to introduce for a new trial. Appellee also argued that had appellant included an affidavit in support of his motion, the affidavit would have been inadmissible hearsay. Appellant then filed a reply to appellee's response.

{¶10} On October 8, 2013, the trial court overruled appellant's motion for leave. As the reason for overruling appellant's motion for leave, the trial court's judgment entry

stated the following: "An e-mail sent by Michael Muldowney does not constitute evidence sufficient to grant a motion for leave to file notice for a new trial for newly discovered evidence. At a minimum, an affidavit is needed."

{¶11} Appellant appealed the trial court's judgment entry overruling his motion for leave. We reversed and remanded the matter, stating that "no affidavit is required to support the motion for leave to file a motion for new trial." *State v. Trimble*, 11th Dist. Portage No. 2013-P-0088, 2015-Ohio-942, ¶18. Further, the trial court's judgment entry made no mention of whether it found that appellant was "unavoidably prevented" from discovering the "new evidence" as required by Crim.R. 33(B). *Id.* Because the trial court had not made that threshold determination, we were left with an insufficient record to review.

{¶12} Following remand, the trial court again overruled appellant's motion for leave, and appellant timely appealed. Appellant sets forth three assignments of error. We consider his first two assignments together, as they are interrelated:

> [1.] The trial court abused its discretion when it denied Appellant's Motion for Leave to file a New Trial Motion under Criminal Rule 33(B), without holding a hearing to determine the threshold issue of whether Appellant was unavoidably prevented from discovering his new evidence within 120 days of the trial verdict.
>
> [2.] The trial court violated Appellant's due process rights when it denied Appellant any fair mechanism for factual development on his Motion for Leave.

{¶13} Appellant argues the trial court abused its discretion by denying his motion for leave without holding a hearing because it did not make an adequate finding on the issue of whether appellant established, by clear and convincing evidence, that he was unavoidably prevented from discovering the "new evidence" within 120 days of the

verdict. Appellant further argues he was denied due process when the trial court denied his motion without holding a hearing.

{¶14} Crim.R. 33(A)(6) provides that a new trial may be granted "on motion of the defendant" when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(B) provides that a motion for new trial upon the ground of newly discovered evidence must be filed within 120 days after 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.

Crim.R. 33(B). The practical effect of this rule is that a defendant must move for leave to file a motion for new trial based on newly discovered evidence if the defendant has missed the 120-day deadline. A trial court may not consider the merits of the motion for new trial until it makes a finding that the defendant was unavoidably prevented from timely discovering the evidence. *State v. Stevens*, 2d Dist. Montgomery Nos. 23236 & 23315, 2010-Ohio-556, ¶11.

{¶15} This court recently clarified the three options a trial court has when a defendant files a motion for leave to file a motion for new trial. *Trimble*, 2015-Ohio-942, ¶16. First, if it determines the documents in support of the motion on their face do not demonstrate the movant was unavoidably prevented from discovering the evidence, it may either overrule the motion or hold a hearing. *See State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶19 (2d Dist.) ("a trial court has discretion when deciding whether to grant leave to file a motion for a new trial, or whether to hold a hearing on

the issue"); *see also State v. Peals*, 6th Dist. Lucas No. L-10-1035, 2010-Ohio-5893, ¶23 (holding the trial court's decision "will not be disturbed on appeal absent an abuse of that discretion"). An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶16} Second, if the trial court determines the documents submitted clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, the court must grant the motion for leave and allow the motion for new trial to be filed. *See* Crim.R. 33(B).

{¶17} Third, if the trial court determines the documents on their face "support [the movant's] claim that he was unavoidably prevented from timely discovering the evidence, the trial court must hold a hearing to determine whether there * * * is clear and convincing proof of unavoidable delay." *State v. York*, 2d Dist. Greene No. 99-CA-54, 2000 Ohio App. LEXIS 550, *3 (Feb. 18, 2000), citing *State v. Wright*, 67 Ohio App.3d 827, 828 (2d Dist.1990); *see also State v. Rice*, 11th Dist. Ashtabula No. 2012-A-0062, 2014-Ohio-4285, ¶14.

{¶18} To begin, we note the jury verdict in this case was rendered on October 25, 2005. Appellant did not file his motion for new trial until August 29, 2013, significantly beyond the 120-day prescribed time period. As such, appellant was required to make a showing by clear and convincing evidence that he was unavoidably prevented from discovering this evidence.

> The standard of 'clear and convincing evidence' is defined as 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal

> cases, 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.'

State v. Schiebel, 55 Ohio St.3d 71, 74 (1990), quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶19} 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. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468, ¶17, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146 (10th Dist.1984).

{¶20} Here, the trial court stated the following in its judgment entry overruling appellant's motion for leave:

> The Court finds the documents provided in support of Defendant's motion, namely emails from Michael Muldowney claiming indirect knowledge of a 'Rogue Swat Officer' inside Sarah Positano's residence, do not demonstrate that Defendant was unavoidably delayed from discovering the evidence within the 120 day period pursuant to Crim.R. 33(B).

{¶21} Appellant argues we must reverse this ruling because the trial court did not offer any "explanation as to why the emails, on their face, were insufficient to warrant further review under Crim.R. 33(B)." We agree and, in doing so, emphasize that the issue before us is not whether the allegations in Mr. Muldowney's emails are sufficient to justify granting a motion for new trial. The only issue we must decide herein is whether the trial court should have granted appellant's motion for leave or, at the least, should have held a hearing on the issue of unavoidable prevention.

{¶22} Appellant was found guilty on October 25, 2005. Mr. Muldowney's emails were not sent to third parties until December 31, 2012, and July 15, 2013. It would be unreasonable to hold that appellant should have (or could have) discovered Mr. Muldowney's emails within 120 days of the verdict when the e-mails were not sent or received until over seven years later. Mr. Muldowney's emails also make it clear that he would not cooperate or give further information about his "evidence" unless he was served with a subpoena. This would make it difficult, if not impossible, to assess the materiality or credibility of his information without holding a hearing. We therefore find that the documents attached to appellant's motion for leave clearly and convincingly demonstrate, on their face, that appellant was unavoidably prevented from discovering the evidence within the 120-day time period. Accordingly, the trial court abused its discretion in overruling appellant's motion for leave.

{¶23} Appellant's first assignment of error has merit, and the matter will be remanded to the trial court for further proceedings. As a result, it is not necessary to consider appellant's second assignment of error, which is hereby overruled.

{¶24} As his third assignment of error, appellant states:

{¶25} "Appellant's due process right to a fair trial was denied when the State suppressed favorable evidence about the presence of law enforcement inside the victim's residence, and when it failed to correct false testimony about the lack of any law enforcement officers inside the victim's residence."

{¶26} Appellant argues appellee's failure to disclose material evidence or correct false testimony violated appellant's due process rights. "[A] prosecutor violates due process when he (1) suppresses evidence (2) that is favorable to the defendant, when

that evidence (3) is material to guilt or innocence." *United States v. Olsen*, 737 F.3d 625, 628 (9th Cir.2013) (Kozinski, C.J., dissenting), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The same due process violation occurs when the prosecution suppresses evidence that bears upon the credibility of a government witness. *Id.*, citing *Giglio v. United States*, 405 U.S. 150, 153-154 (1972).

{¶27} Additionally, "[p]rosecutors have 'a duty to learn of any favorable evidence known to *the others acting on the government's behalf in the case*, including the police.'" *State v. Sanders*, 92 Ohio St.3d 245, 261 (2001) (emphasis sic), quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation'" for purposes of determining whether a *Brady* violation occurred. *State v. Iacona*, 93 Ohio St.3d 83, 92 (2001), quoting *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir.1995).

{¶28} On appeal, appellant argues that appellee suppressed evidence, related to Mr. Muldowney's e-mails, regarding the presence of a rogue law enforcement officer in Ms. Positano's residence. Appellant argues Mr. Muldowney's e-mails are favorable to him because it creates an issue of fact as to the mens rea element of the aggravated murder charge involving Ms. Positano. As previously stated, Mr. Muldowney's e-mails state, in part, that "[o]n or about October/November, of 2005/2006, I communicated what I learned and my concerns [about the presence of a rogue SWAT officer in Positano's home] to then, Chief David Doak, of the Portage County Sheriff Office."

{¶29} Appellant raised this same argument in his previous appeal, and we found it to be without merit for the reasons restated herein. *Trimble*, 2015-Ohio-942, at ¶22-

25. The assignment of error assumes the existence of facts that are not in the record. Whether the conversations alluded to in the e-mails actually took place, and whether those conversations had any relevance to the case, is unresolved. Any claim that appellee withheld evidence is purely speculative. *See State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶60. Therefore, appellant has not met his burden to establish there was a *Brady* violation. *See State v. Moore*, 10th Dist. Franklin Nos. 11AP-1116 & 11AP-1117, 2013 Ohio App. LEXIS 3439, *22-23 (Aug. 1, 2013).

{¶30} Having been resolved in the prior appeal, the ruling on this assignment of error became the law of the case and will not be revised. *See Nolan v. Nolan*, 11 Ohio St.3d 1, 4 (1984).

{¶31} Appellant's third assignment of error is without merit.

{¶32} For the reasons stated above, the judgment of the Portage County Court of Common Pleas is reversed and remanded. Upon remand, the trial court shall enter judgment granting appellant leave to file a delayed motion for new trial. If appellant files such motion within seven days of the trial court's judgment granting leave, the trial court must consider the motion in accordance with Crim.R. 33.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶33} A motion for new trial must be filed within one hundred twenty days of the verdict being rendered. A motion may be filed outside the one hundred twenty day period "[i]f 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). "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." *State v. Hill*, 8th Dist. Cuyahoga No. 102083, 2015-Ohio-1652, ¶ 16; *State v. Lenoir*, 2d Dist. Montgomery No. 26080, 2015-Ohio-1045, ¶ 15 ("[a] defendant is entitled to such a hearing if he submits 'documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence'") (citation omitted).

{¶34} The documents attached to Trimble's motion fall far short of establishing "by clear and convincing proof" that he was unavoidably prevented from discovering the evidence concerning "a Rogue Swat Officer" on which he relies. The trial court's decision to deny leave should be affirmed.

{¶35} Evidence is considered "newly discovered" where 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." (Citation omitted.) *State v. Trimble*, 2015-Ohio-942, 30 N.E.3d 222, ¶ 19 (11th Dist.). When considering leave to file a delayed motion, "the credibility of the new evidence must be assessed." (Citation omitted.) *State v. Metcalf*, 2d Dist. Montgomery No. 26101, 2015-Ohio-3507, ¶ 8. In addition to demonstrating that

he was unavoidably prevented from discovering the evidence within the one hundred twenty day period, the defendant must establish that the purported evidence is "based on fact." (Citation omitted.) *State v. Ogle*, 4th Dist. Hocking No. 13CA9, 2013-Ohio-3770, ¶ 18.

{¶36} In support of his motion for leave, Trimble attached an unsworn email, dated December 31, 2012, from former sheriff's deputy, Michael Muldowney, to Dennis Day Lager, Chief of the Portage County Public Defender's Office. The email claimed that "on or about October/November 2005/2006, [Muldowney] learned that a Rogue Swat Officer was in Sarah Positano['s] duplex during the 2hr cool off period," and "communicated what [he] learned * * * to then, Chief [of the Portage County Sheriff's Office] David Doak." Muldowney further stated that, "on or about, January 2009, [he] had a second conversation with Dave Doak * * * reference the rogue officer."

{¶37} In another unsworn email, dated July 15, 2013, to Mark Rooks of the Office of the Ohio Public Defender, Muldowney states that he has "reached out the best way [he] can to the County and Ohio Public Defenders Office with my email * * * but I cannot move forward without receiving a subpoena first etc."

{¶38} The deficiencies in Trimble's motion for leave are manifold. First, there is no assertion that Trimble has exercised any diligence in attempting to discover purported evidence of a "rogue officer." The existence of such evidence was known to Trimble and presented to the jury at trial: "Trimble contends that he was entitled to an instruction on reckless homicide because he accidentally killed Positano after being surprised by SWAT team members entering the residence. Trimble claims that this assertion is supported by his promise that he would release Positano after two hours

and Dehus's expert testimony that one of the bullets fired by the SWAT team originated from inside the residence." *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 193.

{¶39} Moreover, Trimble was aware of Muldowney's existence and involvement, albeit minor, in the events following Positano's murder. Captain John Ristity of the Portage County Sheriff's Department testified for the defense and identified Muldowney as being present in the Robinson Memorial Hospital emergency room during an examination of Trimble following his arrest. The majority essentially presumes the exercise of due diligence on Trimble's part despite the absence of evidence of any diligence being exercised.

{¶40} A second deficiency in Trimble's motion is that the purportedly "newly discovered evidence" does not qualify as evidence. Muldowney merely claims to have learned what Trimble had already argued at trial. It would be naïve to construe the emails as evidence of a "rogue officer." There is no indication that Muldowney has first-hand knowledge of the presence of an officer in Positano's apartment. There is no indication of what he learned or from whom he learned it. Without knowing what Muldowney's evidence is, it is virtually impossible for Trimble to demonstrate that he could not have discovered the evidence sooner. As it is, Trimble made no such effort.

{¶41} Finally, Muldowney's unsworn, hearsay claim to have contacted Sheriff Doak on two occasions regarding the "rouge officer" is flatly contradicted by the sworn statement of Sheriff Doak that he has "no recollection of a conversation with Michael Muldowney on any of the dates listed [in the email]."

{¶42} The majority makes much of the fact that Muldowney "would not cooperate or give further information about his 'evidence' unless he was served with a subpoena." *Supra* at ¶ 22. Rather than justify the granting of leave to file, this fact underscores Muldowney's lack of credibility. The compulsion of Muldowney's testimony by subpoena has no obvious connection with the "great Emotional Damage" he claims to suffer "at the hands of the Portage County Sheriff's Office."

{¶43} There is nothing remotely arbitrary or unreasonable about the trial court's decision to deny Trimble leave to file a motion for new trial and the majority, once again, improperly substitutes its judgment for that of the lower court in reversing its decision. Accordingly, I respectfully dissent.