[Cite as *State v. Maxwell*, 2010-Ohio-6319.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- AYRON L. MAXWELL Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. CT10-0044 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Common Pleas Court, Case No. CR2005-0223
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 17, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH Assistant Prosecuting Attorney Muskingum County, Ohio 27 North Fifth Street Zanesville, Ohio 43702-0189	ARYON L. MAXWELL, PRO SE Ross Correctional Institue #518-531 P.O. Box 7010 Chillicothe, Ohio 45601

Hoffman, P.J.

{¶1} Defendant-appellant Aryon L. Maxwell appeals the August 18, 2010 Journal Entry entered by the Muskingum County Court of Common Pleas, which denied his motion for new trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On August 11, 2005, the Muskingum County Grand Jury indicted Appellant on the following seven counts: (1) aggravated burglary with a firearm specification in violation of R.C. 2911.11(a)(2) and 2941.145, a felony of the first degree; (2) theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree; (3) theft of credit cards in violation of R.C. 2913.02(A)(1), a felony of the fifth degree; (4) theft of dangerous drugs in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; (5) burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree; (6) theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; and, (7) theft of dangerous drugs in violation of R.C. 2913.02(A)(1), a felony of the fourth degree. Appellant appeared before the trial court for arraignment on September 21, 2005, and entered pleas of not guilty to the charges.

{¶3} The matter proceeded to jury trial. The jury found Appellant guilty of Counts One and Two, aggravated burglary with a firearm specification and theft of a firearm. The jury acquitted Appellant of the remaining charges. The trial court sentenced Appellant to an aggregate term of imprisonment of sixteen years. Appellant appealed the conviction and sentence. This Court affirmed Appellant's conviction and sentence. *State v. Maxwell*, Muskingum App. No. C220060029, 2007-Ohio-4027.

{¶4} On July 14, 2010, Appellant filed a Motion for New Trial on the grounds of newly discovered evidence and irregularity in the proceedings due to defects in the verdict forms. Via Journal Entry filed August 18, 2010, the trial court denied the motion.

{¶5} It is from this journal entry Appellant appeals, raising the following assignments of error:

{¶6} "I. THE DEFENDANTS [SIC] NEWLY DISCOVERED EVIDENCE DEMONSTRATES PROSECUTORIAL MISCONDUCT THUS DENY HIM DUE PROCESS OF LAW.

{¶7} "II. THE DEFENDANT'S VERDICT FORM'S [SIC] ARE DEFECTIVE AND VIOLATES DUE PROCESS."

{¶8} This case comes to us on the accelerated calendar, and is governed by App.R. 11.1. App.R. 11.1 provides:

{¶9} "(E) Determination and judgment on appeal

{¶10} "The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

{¶11} "The decision may be by judgment entry in which case it will not be published in any form."

I

{¶12} In his first assignment of error, Appellant maintains the trial court erred in denying his motion for new trial. We disagree.

{¶13} Crim. R. 33 governs a motion for new trial, and provides:

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

{¶15} "(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;

{¶16} "* * *

{¶17} "(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. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

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

{¶19} "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* * * " Crim.R. 33.

{¶20} The decision whether to grant or deny a motion for a new trial is committed to the sound discretion of the trial court. See *State v. LaMar* (2002), 95 Ohio St.3d 181, 201, 767 N.E.2d 166; *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus; see, also, *State v. Matthews* (1998), 81 Ohio St.3d 375, 691 N.E.2d 1041; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus. Thus, we will not reverse a trial court's denial of a motion for a new trial absent an abuse of that discretion. *LaMar,* 95 Ohio St.3d at 201, 767 N.E.2d 166; *Schiebel,* 55 Ohio St.3d at 76, 564 N.E.2d 54. An abuse of discretion is more than an error in judgment. Instead, it implies that a court's ruling is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶21} If a defendant files a motion for a new trial after the time periods specified in Crim.R. 33(B) have expired, the defendant first must seek leave of court to file a delayed motion. *State v. Mathis* (1999), 134 Ohio App.3d 77, 79, 730 N.E.2d 410. To obtain leave, the defendant must demonstrate by clear and convincing evidence that he was unavoidably prevented from timely filing the motion for a new trial or from

discovering the new evidence. Id.; *State v. Roberts* (2001), 141 Ohio App.3d 578, 582, 752 N.E.2d 331. A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the evidence or grounds supporting the motion for a new trial and, in the exercise of reasonable diligence, could not have learned of the matters within the time provided by Crim.R. 33(B). *Mathis,* supra.

{¶22} Appellant filed his motion for new trial well beyond one hundred twenty days after his conviction. Appellant has presented no evidence, let alone clear and convincing proof, he was unavoidably prevented from the discovery of the evidence upon which he relies. In fact, the alleged "newly discovered evidence" belies any assertion Appellant could make. The affidavit of his co-defendant is dated May 26, 2006. Accordingly, we find Appellant was aware of his claim several months after his conviction in 2006.

{¶23} Appellant's first assignment of error is overruled.

II

{¶24} In his second assignment of error, Appellant submits the trial court erred in denying his motion for new trial on the ground of irregularity of the proceedings as the verdict forms were defective, thus violating his right to due process. We disagree.

{¶25} We find Appellant's motion is barred by the doctrine of res judicata. It is well-settled "pursuant to res judicata, a defendant cannot raise an issue in a [petition] for post conviction relief if he or she could have raised the issue on direct appeal." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304,161.

{¶26} Appellant's second assignment is overruled.

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

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
AYRON L. MAXWELL	:	
	:	
Defendant-Appellant	:	Case No. CT10-0044

For the reasons stated in our accompanying Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY