[Cite as *State v. Mason*, 2017-Ohio-7571.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 17CAA030017
	:	
CAMERON J. MASON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 14 CR I 10 0440 B

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 7, 2017

APPEARANCES:

For Plaintiff-Appellee:

CAROL HAMILTON O'BRIEN
DELAWARE CO. PROSECUTOR
ANDREW M. BIGLER
140 North Sandusky St., 3rd Floor
Delaware, OH 43015

For Defendant-Appellant:

CAMERON J. MASON, PRO SE
Prisoner No. A712-735
Warren Correctional Institution
P.O. Box 120
Lebanon, OH 45036

Delaney, P.J.

{¶1} Appellant Cameron J. Mason appeals from the February 9, 2017 "Judgment Entry Denying Motion for Newly Discovered Evidence and in the Alternative Motion Pursuant to Criminal R. 52(B)" of the Delaware County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal conviction is not necessary to our resolution of this appeal.

{¶3} Appellant and co-defendant D'Shawn Barnes were charged by indictment with two counts of rape pursuant to R.C. 2907.02(A)(2), both felonies of the first degree [Counts I and II] and two counts of rape pursuant to R.C. 2907.02(A)(1)(c), both felonies of the first degree [Counts III and IV]. Appellee's bill of particulars dated October 13, 2014 indicates this case arose when appellant raped and/or was complicit in two acts of rape against an intoxicated victim during a period of time from May 24, 2014 through May 25, 2014.

{¶4} Appellant moved to sever his trial from that of the co-defendant and the motion was granted. The matter proceeded to trial by jury; appellee dismissed Counts II and IV, and the trial court granted a motion to dismiss Count I pursuant to Crim.R. 29(A). Appellant was found guilty upon Count III and sentenced to a prison term of five years. The trial court determined appellant to be a Tier III sex offender.

{¶5} Appellant filed a direct appeal from his conviction and sentence, arguing his conviction was against the manifest weight and sufficiency of the evidence. *State v.*

Mason, 5th Dist. Delaware No. 15-CAA-02-0017, 2015-Ohio-2508. We disagreed and affirmed appellant's convictions and sentence. Id.

{¶6} On February 2, 2017, appellant filed a pro se "Motion for Newly Discovered Evidence and in Alternative Motion Pursuant to Criminal R. 52(B)." The motion asserts appellant received ineffective assistance of counsel. The motion contains no operative facts, but implies appellant would have accepted an offer to plead to a lesser offense if he had received effective assistance of trial counsel. Appellee filed a response in opposition on February 3, 2017 and the trial court overruled the motion on February 9, 2017.

{¶7} Appellant now appeals from the trial court's judgment entry of February 9, 2017.

{¶8} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶9} ["THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR NEWLY DISCOVERED EVIDENCE AND IN THE ALTERNATIVE MOTION PURSUANT TO CRIMINAL R. 52(B)."][1]

ANALYSIS

{¶10} Appellant argues the trial court erred in overruling his motion for a new trial on the basis of newly-discovered evidence. We disagree.

---

[1] Appellant has not raised an assignment of error per se, although he cites a number of arguments "in support of his assignment of error" pertaining to his allegations of ineffective assistance of counsel, the basis of his "motion for newly discovered evidence and in the alternative motion pursuant to Criminal R. 52(B)."

{¶11} We begin by noting appellant has not referenced any underlying facts of his case. It is not apparent to us where any error appears in the record. His appellate brief is a restatement of his pro se motion in the trial court, in which he references "newly-discovered evidence" and argues he received ineffective assistance of counsel. Attached to his motion in the trial court is a handwritten copy of a portion of transcript in which the trial court asks the parties whether any plea offer has been made to appellant and appellee responds an offer was made to plead to one count of gross sexual imposition, a felony of the third degree, with a joint recommendation of a prison term of 3 years.

{¶12} It is not clear what appellant's complaint is about the plea offer, although he references the right to effective assistance of counsel in plea bargaining throughout his motion and appellate brief.

{¶13} Appellant moved the trial court for a new trial pursuant to Crim.R. 33. A motion for a new trial made pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and may not be reversed unless we find an abuse of discretion. *State v. Schiebel,* 55 Ohio St.3d 71, 75, 564 N.E.2d 54 (1990). It is also within the discretion of the trial court to determine whether a motion for a new trial and the material submitted with the motion warrants an evidentiary hearing. *State v. Hill*, 64 Ohio St.3d 313, 333, 595 N.E.2d 884 (1992). An abuse of discretion implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *State v. Sage,* 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987).

{¶14} To warrant the granting of a motion for a new trial 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 of a new trial if 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. Petrone*, 5th Dist. Stark No. 2013 CA 00213, 2014-Ohio-3395, ¶ 72, citing *State v. Petro,* 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶15} Appellant's motion before the trial court, and his argument on appeal, both refer to "newly discovered evidence," although appellant does not state what this evidence is. Under Crim.R. 33(A)(6), a new trial may be granted when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Appellant's "evidence" seems to involve alleged ineffective assistance of counsel during plea negotiations, but he cites no reason why he was prevented from raising this argument in his direct appeal to this court.[2] *State v. Russell*, 10th Dist. Franklin No. 04AP–1149, 2005–Ohio–4063, ¶ 7, motion for delayed appeal denied, 107 Ohio St.3d 1695, 2005–Ohio–6763, 840 N.E.2d 202.

{¶16} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or 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. Szefcyk,* 77 Ohio St.3d 93, 96, 1996–Ohio–337, 671 N.E.2d 233; *State v. Perry*, 10 Ohio

---

[2] Because appellant has not presented any facts underlying his arguments other than the portion of transcript including the plea offer, it is not evident that any of appellant's arguments are based on facts outside the record. Appellant has not filed a petition for post-conviction relief.

St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Not only does res judicata bar appellant from raising issues that were raised in his direct appeal, it also bars issues that could have been raised in that appeal. *Szefcyk,* supra.

{¶17} Because appellant could have raised the issue of ineffective assistance in his direct appeal, the argument now, to the extent it is based upon events in the record, is barred by res judicata.[3] See, *Petrone,* supra, 2014-Ohio-3395, ¶ 72, citing *State v. Stark,* 2nd Dist. Montgomery No. 19515, 2004–Ohio–670, at ¶ 7 [affirming application of res judicata to deny defendant's claims of alleged trial error that should have been raised on direct appeal]; *State v. Palmer*, 7th Dist. Belmont No. 96–BA–70, 1999 WL 979228 (Oct. 20, 1999) [affirming denial of motion for new trial based solely on facts within trial record as res judicata].

{¶18} We also note Crim.R. 33(B) provides that 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 from the trial court's decision 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." Thus, an untimely motion for new trial based on newly discovered evidence must show, by clear and convincing proof, that the defendant was "unavoidably prevented" from discovering the new evidence. *State v. Fortson,* 8th Dist. Cuyahoga No. 82545, 2003–Ohio–5387, ¶ 10. In the instant case, the verdict was rendered on December 17, 2014, therefore appellant's motion was due on or before April 16, 2015, unless appellant demonstrates he was

[3] We further note appellant's motion states "in the alternative, pursuant to Crim.R. 52(B)," but appellant has not cited any instances of plain error in the record or stated why, if plain error occurred, it was not raised on direct appeal.

unavoidably prevented from discovering the new evidence. Notwithstanding the fact that we remain unaware of what the new evidence is, appellant's motion of February 2, 2017 was filed out of time, and appellant has not demonstrated how or why he was unavoidably prevented from the discovery of the "newly discovered" evidence within the time limitations of Crim.R. 33. *Petrone*, supra, 2014-Ohio-3395 at ¶ 74.

{¶19} Appellant's arguments are not properly raised pursuant to Crim.R. 33. See, *State v. Shuster*, 5th Dist. Morgan No. 16AP0012, 2017-Ohio-2776, ¶ 16. The claims contained in his motion are cognizable from the trial record and are barred by the doctrine of res judicata, which may be applied to bar further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. *Id.*, citing *State v. Johnson*, 8th Dist. Cuyahoga No. 80247, 2002–Ohio–2712, ¶ 7.

{¶20} Accordingly, the trial court did not abuse its discretion when it denied appellant's motion for a new trial. Appellant's sole assignment of error is overruled.

CONCLUSION

{¶21} Appellant's sole assignment of error is overruled and the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, John, J. and

Wise, Earle, J., concur.