

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

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| STATE OF OHIO | : | |
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| Plaintiff-Appellee | : | C.A. CASE NO. 2009 CA 84 |
| v. | : | T.C. NO. 07 CR 0407 |
| | : | |
| ROGER LANIER | : | (Criminal appeal from Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |

OPINION

Rendered on the 25th day of June, 2010.

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Attorney for Plaintiff-Appellee

ROGER LANIER, #556419, Warren Correctional Institute, P. O. Box 120, Lebanon, Ohio 45036
Defendant-Appellant

FROELICH, J.

{¶ 1} Roger Lanier appeals from the denial of his motion for leave to file an untimely motion for a new trial based on newly discovered evidence. For the following reasons, the trial court’s judgment will be affirmed.

{¶ 2} In July 2007, Lanier was convicted after a jury trial of having weapons while under disability, carrying a concealed weapon, and improper handling of a firearm in a motor vehicle. The charges arose out of the discovery of a gun after Springfield police officers stopped the vehicle that Lanier was driving on April 12, 2007. The trial court imposed consecutive sentences totaling eight years. We affirmed Lanier’s conviction and sentence on August 8, 2008. *State v. Lanier*, Clark App. No. 2007 CA 77, 2008-Ohio-4018.

{¶ 3} On July 21, 2009, Lanier filed a motion for leave to file an untimely motion for a new trial. Simultaneously, he submitted his motion for a new trial based on newly discovered evidence. In his motion for leave, Lanier asserted that a new witness had recently been discovered and located. Lanier stated: “This new witness had to be located by Ms. [Nikki] Harding, whom has also presented an affidavit swearing how she searched and located Ms. Musheer, the owner of the gun.” Lanier stated that Brenn Musheer would testify that she had accidentally left the gun in the vehicle that Lanier later drove and that Lanier did not know that she had left the gun behind.

{¶ 4} Affidavits from Harding, Musheer, and Lanier were attached to his accompanying motion for a new trial. Lanier’s affidavit stated:

{¶ 5} “On April 12, 2007 I asked Kiesha D. Morris to use her car to go to the store. As I was returning from the store I was stopped by the police. I was asked for my license by the police and when I produced it, it was determined that my license was expired. The police placed me in the backseat of the police car at that time. A search was made of the car I was driving and a gun was found. I told the police nothing just as Officer Anna Fredendall stated in her direct testimony in trial. I never knew a gun was in the car until the police

found one.”

{¶ 6} Harding’s affidavit read:

{¶ 7} “In regards to Roger Lanier’s case I had to find the owner of the gun that was left in the car Roger was driving. Considering he didn’t know who the owner of the gun was I had to check several possibilities before I found the owner Miss Musheer.

{¶ 8} “Miss Musheer did agree to write a statement stating it was her gun and she has receipts [sic] for the gun that she left in the car by mistake.”

{¶ 9} Musheer’s affidavit stated:

{¶ 10} “I was riding with a friend earlier the day of April 12, 2007. My Taurus 9mm was left by mistake. [D]uring this time I was moving boxes and bags out of the car. The driver left before I could grab my gun out of the car. I had no way of getting in contact with the driver before [sic] she returned to her destination. Mr. Lanier apparently used the car without knowing the gun was there. The owner of the car called and stated that Mr. Lanier was charged with the gun, after being pulled over. I was told to present a statement and proof of purchase of the Taurus 9mm which if needed proof of purchase can be presented on his behalf. I give testimony on this day 2-24-09 @ 1:38 p.m.”

{¶ 11} On August 11, 2009, the trial court overruled Lanier’s motion for leave, stating simply, “Defendant’s motion for leave of court to file a motion for a new trial is OVERRULED.” Lanier appeals from the trial court’s judgment.

II

{¶ 12} Lanier’s sole assignment of error states:

{¶ 13} “THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE

PREJUDICE OF APPELLANT BY FAILING TO MAKE A FACTUAL DETERMINATION AS TO WHETHER OR NOT APPELLANT WAS UNAVOIDABLY PREVENTED FROM THE DISCOVERY OF NEW EVIDENCE BEFORE OVERRULING MOTION OF APPELLANT FOR LEAVE TO FILE A MOTION FOR NEW TRIAL.”

{¶ 14} “Crim R. 33(A)(6) permits a convicted defendant to file a motion for a new trial upon grounds that new evidence material to the defense has been discovered that the defendant could not with reasonable diligence have discovered and produced at trial.” *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶15; see Crim.R. 33(A)(6). A motion based on newly discovered evidence must be filed within 120 days after the day of the verdict, unless the trial court finds by clear and convincing evidence that the defendant was “unavoidably prevented” from discovering the new evidence. Crim.R. 33(B); *State v. Stevens*, Montgomery App. Nos. 23236 & 23315, 2010-Ohio-556, ¶10.

{¶ 15} A defendant who seeks a new trial after the 120-day time period must first obtain leave from the trial court, demonstrating “by clear and convincing evidence that he or she was unavoidably prevented from timely filing the motion for a new trial or discovering the new evidence within the time period provided by Crim.R. 33(B).” *State v. Warwick*, Champaign App. No. 01CA33, 2002-Ohio-3649. See, also, *Stevens* at ¶10. “[A] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.” *State v. Walden* (1984), 19 Ohio App.3d 141, 146; *State v. Wilson*, Montgomery App. No. 23247, 2009-Ohio-7035, ¶8.

{¶ 16} A defendant is entitled to a hearing on his motion for leave if he submits “documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence” at issue. *State v. York* (Feb. 18, 2000), Greene App. No. 99-CA-54; *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶19.

{¶ 17} Although a defendant may file his motion for a new trial along with his request for leave to file such motion, the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay. *York*, supra; *Stevens* at ¶11.

{¶ 18} We review the trial court’s denial of leave to file a motion for a new trial for an abuse of discretion. *State v. Neguse*, Franklin App. No. 09AP-843, 2010-Ohio-1387, ¶7. See, also, *Parker* at ¶24. An abuse of discretion occurs when the decision of a court is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 19} Lanier was convicted in July 2007, but he did not file his motion for leave to file a motion for new trial based on newly discovered evidence until July 2009, well beyond the 120-day limit in Crim.R. 33(B). Consequently, Lanier was required to submit documents which on their face supported his claim that he had no knowledge of the ground supporting the motion for a new trial he sought to file and that he could not have learned of the existence of that ground within 120 days of the July 2007 verdict.

{¶ 20} Initially, we note that the State argues, in part, that Lanier’s new evidence would not justify granting his motion for a new trial. The State points out that Musheer claimed to own a Taurus 9mm pistol whereas a .40 caliber firearm was introduced at

Lanier's trial. Moreover, the State asserts that Musheer would not have personal knowledge of whether Lanier knew that a gun was in Morris's vehicle. And, Musheer's affidavit was contrary to the testimony of Officers Fredendall and Haytas at trial that Lanier acknowledged that there was a gun in Morris's car and that the gun located below the driver's seat belonged to his (Lanier's) brother. The State concludes: "Because nothing presented by the Appellant would have led the trial court to conclude that the evidence would have been of such manifest weight as to change the outcome of the trial, the trial court cannot be said to have abused its discretion in overruling Appellant's motion."

{¶ 21} We emphasize that the merits of Lanier's motion for a new trial are not before us. The alleged deficiencies in Lanier's supporting affidavits notwithstanding, our sole concern is whether the trial court abused its discretion in denying, without a hearing, Lanier's motion for leave to file a motion for a new trial, not whether the motion for a new trial has merit. As such, we may consider only whether Lanier was unavoidably prevented from obtaining his new evidence and filing a timely motion for a new trial or, at the very least, whether Lanier's supporting affidavits on their face support his claim that he was unavoidably prevented from timely discovering the evidence such that the trial court should have held a hearing on whether he was unavoidably prevented from timely discovering the evidence.

{¶ 22} Even accepting the affidavits attached to Lanier's motion for a new trial as true, we find no evidence demonstrating that Lanier was unavoidably prevented from locating Musheer in a timely manner and, consequently, we cannot find that the trial court abused its discretion in denying, without a hearing, Lanier's motion for leave to file a

delayed motion for a new trial. For example, the affidavits fail to indicate who Harding is or why it took her two years to locate Musheer; nothing in the affidavits details the “several possibilities” that Hardy “had to check” regarding the individuals who had been in and/or used Morris’s car on April 12, 2007, or shortly before that date. There are no indications that Musheer’s whereabouts were unknown or that her ownership of the gun could not be confirmed until after the 120-day period had expired. Moreover, Lanier fails to state why he was unaware of the existence of this ground for a new trial – i.e., that the gun located in the car belonged to an unknown person and was in the car without his knowledge – before and during trial or within 120 days of the verdict.

{¶ 23} Obviously, if there is new evidence which might tend to result in a new trial, a defendant wants to locate it and present it to the court without unavoidable delay. It could be argued that Harding’s affidavit suggests no avoidable delay. However, that argument would be present, almost by definition, in any late motion for a new trial. The law is clear that the burden is on the movant to submit documents which, on their face, support his claim that he was unavoidably prevented from timely discovery of the new evidence, and the trial court did not abuse its discretion in finding that Lanier did not.

{¶ 24} The assignment of error is overruled.

III

{¶ 25} The trial court’s judgment will be affirmed.

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FAIN, J. and DONOFRIO, J., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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