

[Cite as *State v. Green*, 2015-Ohio-1118.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 13 MA 120
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
KEVIN GREEN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 99 CR 893(C).

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee: Attorney Paul J. Gains  
Prosecuting Attorney  
Attorney Ralph M. Rivera  
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: March 18, 2015

[Cite as *State v. Green*, 2015-Ohio-1118.]  
DeGENARO, J.

{¶1} Appellant Kevin Green appeals the judgment of the Mahoning County Court of Common Pleas denying his motion for leave to file a delayed motion for new trial. Green argues that new evidence, in the form of a confession contained in a co-defendant's affidavit, would exonerate him, and the trial court should have afforded him the opportunity of examining that evidence in a hearing. Although Green's claims are barred by res judicata because this court previously determined that his co-defendant's prior post-conviction affidavits did not constitute newly discovered evidence; for the same reasons here, the purported confession does not constitute newly discovered evidence. Accordingly, the judgment of the trial court is affirmed.

### **Facts and Procedural History**

{¶2} The facts of this case were detailed in Green's direct appeal, which affirmed Green's conviction and sentence:

On the night of September 17, 1999, John Allen, the victim, was at an apartment building located at 1515 Market Street, Youngstown, Ohio. Green, William Robinson, Jeron Hunter, and Lamar Logan were also at this apartment building. Sometime during that night, Allen told Robinson that he was planning to rob Green. (Tr. 595). Robinson reported this information to Green which resulted in Green asking Robinson to get him a gun. (Tr. 597). Robinson left the apartment building and later returned with a gun. Once Green had the gun, he and Robinson confronted Allen about Allen's plan to rob Green. During the confrontation, Robinson hit Allen because it looked as if Allen had a gun. Green, Hunter, and Logan also began hitting Allen. (Tr. 604).

According to Robinson, the beating of Allen continued to ensue for several minutes. (Tr. 606). Robinson claims that Green tied up Allen and with the help of Hunter carried Allen to Green's car where they placed him in the trunk. (Tr. 607). It is claimed that Green, Hunter and Robinson then went to Lincoln Park, Youngstown, Ohio, where Allen was fatally shot six times in

the head. (Tr. 356, 369). The testimony does not reveal who had the gun in Lincoln Park or who shot Allen. Logan, Hunter and Robinson all entered plea agreements with the state to testify against Green.

Green admitted at trial that he left Youngstown after he heard the news reports about Allen's murder. (Tr. 772, 800). He stated he returned to Youngstown and turned himself in to police when he learned they were looking for him. Green was indicted for aggravated murder and kidnapping on October 14, 1999. Due to the number of continuances filed, he was not brought to trial until February 15, 2001.

The jury returned a not guilty verdict on the aggravated murder charge, however the jury found Green guilty of complicity to commit aggravated murder and kidnapping. The trial court sentenced Green to life imprisonment for the murder charge and ten years for kidnapping. The terms were ordered to be served consecutively.

*State v. Green*, 7th Dist. No. 01-CA-54, 2003-Ohio-3074, ¶ 2-5 (*Green I*).

{¶3} Subsequently, Green filed multiple motions and appeals, most of which are not pertinent for consideration of this appeal. On November 12, 2009, Green moved for leave to file a delayed motion for new trial pursuant to Criminal Rule 33(A)(6), based on newly discovered evidence in the form of statements and affidavits from co-defendant Jeron Hunter. *State v. Green*, 7th Dist. No. 10 MA 43, 2010-Ohio-6271, ¶7. Within these documents, Hunter stated that he and Green were not at Lincoln Park on the night of the murder. *Id.* at ¶11. Green argued that this constituted newly discovered evidence that significantly contradicted the testimony of the state's witnesses predicated a different result at trial, if a new trial was granted. *Id.* The trial court overruled his motion, and this Court affirmed:

"Appellant did not file his motion for leave to file a delayed motion for new

trial until eight years after his jury trial. In his motion, he admitted he learned of the new evidence "shortly there-after [sic.]" his February 2001 trial. Thus, the eight-year delay was clearly unreasonable.

Additionally, appellant, through his counsel, was aware of Hunter's letter because it was included in the supplement to discovery on May 22, 2000, nine months before trial. According to that letter, Hunter was even willing to give a statement at that time. Given Hunter's willingness, with due diligence appellant could have uncovered the related information contained in Hunter's subsequent affidavits. Thus, even though appellant himself may not have "stumbled upon" the evidence until later, there is no clear and convincing evidence that anything prevented him from discovering such evidence at the time of the trial. Therefore, it is not "newly discovered" pursuant to Criminal Rule 33.

*Id.* at ¶20-21.

{¶4} On May 15, 2013, Green filed yet another request for leave to file a delayed motion for new trial and attached two affidavits from Jeron Hunter. The trial court overruled Green's motion without a hearing.

#### **Law and Argument**

{¶5} In his sole assignment of error, Green asserts:

"THE TRIAL COURT ABUSED ITS DESCRETION (sic) WHEN IT DENIED DEFENDANT APPELLANT'S MOTION FOR A NEW TRIAL."

{¶6} A trial court's decision to grant or deny a new trial on grounds of newly discovered evidence falls within the court's sound discretion. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). Therefore, this Court will not reverse such a decision absent an abuse of discretion. "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court

merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶21.

{¶7} A motion for a new trial based upon newly discovered evidence must be filed within one hundred twenty days after the verdict unless the court finds by clear and convincing proof that the defendant was unavoidably prevented from discovering the evidence within the one hundred twenty-day-time period. Crim.R. 33. "[A] party is unavoidably prevented from filing a motion for 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*, 19 Ohio App.3d 141, 145–146, 483 N.E.2d 859 (1984). Leave of court must be granted before the merits of the motion are reached. *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶25.

{¶8} Green's motion was filed outside the one hundred twenty-day-time period. The State contends that Green was not unavoidably prevented from discovering the evidence that served as the basis for his motion. Green counters that his motion was filed one day after receiving Hunter's affidavit "confessing of the crime and exonerating Mr. Green of any wrongdoing" and stresses that the Hunter affidavit is significant because he "never went so far as to confess to the murder."

{¶9} Although Green was acquitted on the aggravated murder charge, he was convicted of complicity to commit aggravated murder and kidnapping; thus, Hunter's admission to the murder is not dispositive. Not only is Hunter's most recent affidavit similar in substance to Hunter's prior affidavits that were reviewed by this court in Green's last appeal, moreover, Green fails to raise a different issue in this appeal from what had been raised and considered by this court in *State v. Green*, 7th Dist. No. 10 MA 43, 2010-Ohio-6271. Accordingly, this issue is res judicata, and we resolve Green's appeal on this basis alone.

{¶10} Nonetheless, consistent with our previous decision, Green's request for a new trial, now 12 years later, is clearly not timely and equally as unreasonable.

{¶11} The record is replete with letters and affidavits throughout the pendency of this case filed by Hunter. Merely because Hunter decided to say something different in the affidavit that forms the basis of this appeal, does not make it newly discovered.

{¶12} Further, assuming *arguendo* that this issue is not *res judicata* and the merits could be reached, a new trial based on newly discovered evidence should be granted only if the new evidence: "(1) discloses a strong probability that it will change the result if a new trial is 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. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947).

{¶13} Green would be unable to overcome several of these prongs. First and foremost, although Green was acquitted on the aggravated murder charge, he was convicted of complicity to commit aggravated murder and kidnapping; thus, Hunter's admission to the murder is not dispositive. Further, Hunter's testimony and involvement in the crimes was known far prior to trial. Finally, this recent iteration of Hunter's proffered testimony would merely contradict evidence that was previously admitted in trial.

{¶14} In sum, Green's assignment of error is meritless. Although Green's claims are barred by *res judicata* because this court previously determined that his co-defendant's prior post-conviction affidavits did not constitute newly discovered evidence, for the same reasons here, the purported confession does not constitute newly discovered evidence. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.