

[Cite as *State v. Baer*, 2017-Ohio-7759.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 HA 0015
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
WILLIAM H. BAER)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Harrison County,
Ohio
Case No. 2006-0691

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. T. Owen Beetham
Harrison County Prosecutor
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P.O. Box 248
Cadiz, Ohio 43907

For Defendant-Appellant: William H. Baer, *Pro se*
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Grafton Correctional Institution
2500 S. Avon-Belden Road
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 18, 2017

[Cite as *State v. Baer*, 2017-Ohio-7759.]
WAITE, J.

{¶1} Appellant William H. Baer appeals a July 29, 2016 Harrison County Common Pleas Court decision denying him leave to file a motion for a new trial. Appellant argues that he was unavoidably prevented from obtaining evidence in his favor. As such, he argues that the trial court erroneously denied his motion and refused to hold an evidentiary hearing. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On July 7, 2006, Appellant was indicted on two counts of rape, a felony of the first degree in violation of R.C. 2907.02(A)(1)(b), two counts of sexual battery, a felony of the third degree in violation of R.C. 2907.03(A)(5), and two counts of gross sexual imposition ("GSI"), a felony of the third degree in violation of R.C. 2907.05(A)(1). On May 24, 2007, the indictment was amended to reflect that the two rape counts were special felonies that were punishable by ten years to life in prison because the victims were under the age of thirteen. On September 27, 2007, Appellant was convicted by a jury on all counts. On October 11, 2007, the trial court held a sentencing hearing. The court determined that the sexual battery and GSI counts merged with the rape counts for sentencing purposes. Appellant was sentenced to life imprisonment with parole eligibility after ten years on both rape counts. The sentences were ordered to run consecutively.

{¶3} Appellant filed an unsuccessful appeal in *State v. Baer*, 7th Dist. No. 07 HA 8, 2009-Ohio-3248. Appellant also unsuccessfully filed a habeas corpus motion in *Baer v. Clipper*, S.D. Ohio No. 2:10-cv-1164, 2013 WL 317061 (Jan. 28, 2013). On

May 16, 2016, Appellant sought leave to file a motion for a new trial and requested an evidentiary hearing. On July 29, 2016, the trial court denied Appellant's motion without holding an evidentiary hearing. This timely appeal follows.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL WHERE DEFENDANT MADE SUFFICIENT SHOWING THAT HE WAS UNAVOIDABLY PREVENTED FROM OBTAINING THE EXTANT EVIDENCE UPON WHICH THE PROPOSED MOTION FOR NEW TRIAL RELIES WITHIN 120 DAYS OF THE VERDICT TO WARRANT LEAVE BEING GRANTED.

{14} Appellant asserts that he has located several witnesses who are willing to testify that his ex-wife convinced their children to say that Appellant had sexually abused them. He claims that she sought revenge after learning that he was leaving her for another woman. He argues that he did not know that these witnesses had relevant knowledge or whether they would be willing to testify at the time of trial. As such, he argues that he was unable to discover this "evidence" until recently, when his family hired a private investigator.

{15} In response, the state argues that these affidavits do not constitute newly discovered evidence because Appellant's defense rested on the premise that his ex-wife had set him up. The state points out that the alleged witnesses are his girlfriend, her family, and several other friends. The state contends that Appellant

had access to these people at the time of trial. Further, Appellant waited nine years after his direct appeal to file this motion.

{¶16} Crim.R. 33(B) states in pertinent part:

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.

{¶17} The Ohio Supreme Court has established a six-part test for determining whether a motion for a new trial should be granted:

To warrant the granting of a motion for a new trial in a criminal case, based 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 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. Lopa*, 96 Ohio St. 410, [117 N.E. 319,] approved and followed.)

State v. Williams, 7th Dist. No. 14 JE 13, 2015-Ohio-2687, ¶ 8, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶8} Appellant attached nine affidavits to his motion. The affidavits will be discussed in two groups. The first affidavit is signed by Chad Courtney, who formerly dated Appellant's ex-wife. The affidavit was signed on March 12, 2008. The second affidavit is signed by David F. Loar, who also dated Appellant's ex-wife. The affidavit was signed on March 10, 2008. The third affidavit is signed by Shelly Green, Appellant's girlfriend. The affidavit is dated October 19, 2007. The fourth affidavit is signed by Crystal Samon, Shelly's sister. The affidavit was dated October 19, 2007. The fifth affidavit is signed by Donna Jordan-Jarvis, Shelly's mother and was signed on October 19, 2007. The sixth affidavit was signed by Charles B. Jarvis, Shelly's father on November 7, 2007.

{¶9} Each of these affidavits was signed within two weeks to five months after Appellant's sentencing hearing. Clearly these affidavits were available to Appellant prior to his direct appeal. Appellant has not explained why he waited nine years after obtaining the affidavits to file his motion for leave. As such, these affidavits do not constitute newly discovered evidence.

{¶10} The second set of affidavits are more recent. The first is signed by Dan Pittson, a friend of Appellant's. The affidavit was signed on October 23, 2015. The second affidavit was signed by Steven Duke, Appellant's friend, on February 26,

2016. The final affidavit was signed by Kimberly Duke, Steven's wife, on February 26, 2016.

{¶11} Although these affidavits were signed much more recently, they allege the same basic facts as the previous affidavits. Each of these affidavits, including the earlier ones, was designed to bolster Appellant's argument that his ex-wife set him up because he told her he was leaving. While the affidavits were not presented at trial, Appellant did advance this identical argument at trial. *Id.* at ¶ 47. Contrary to Appellant's argument that he was unaware these witnesses had relevant knowledge, Dan Pittson and Steven Duke were both subpoenaed and listed on Appellant's witness list prior to trial. Hence, none of the affidavits constitute newly discovered evidence. Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING ON THE ISSUES, WHICH DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

{¶12} A trial court holds the discretion to decide whether a Crim.R. 33 hearing should be held. *State v. Rodriguez-Baron*, 7th Dist. No. 12-MA-44, 2012-Ohio-5360, ¶ 7, citing *State v. Green*, 7th Dist. No. 05-MA-116, 2006-Ohio-3097, ¶ 11. If a motion for a new trial is filed after the 120-day limit in Crim.R. 33(B), then the

defendant must establish by clear and convincing evidence that there was unavoidable delay in filing the motion. *Williams, supra*, ¶ 7, citing *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶ 25 (7th Dist.). “Unavoidable delay results when the party had no knowledge of the existence of the grounds in support of the motion for a new trial and could not have learned of the existence of those grounds within the required time, exercising reasonable diligence.” *Williams* at ¶ 7.

{¶13} As Appellant had knowledge of most of these affidavits nine years ago, he is unable to show unavoidable delay. To any extent that Appellant may not have personally seen these documents in 2008, he admits that his family hired the private investigator who obtained the affidavits. As such, the information and witnesses were discoverable through reasonable due diligence. Appellant’s second assignment of error also lacks merit and is overruled.

Conclusion

{¶14} Appellant argues that he was unavoidably prevented from obtaining evidence in his favor. As such, he argues that the trial court erroneously denied his motion for leave to file a motion for a new trial. He also argues that the trial court erroneously refused to hold an evidentiary hearing. Most of the affidavits were available to Appellant prior to his direct appeal. The affidavits that were not prepared at that time allege the same basic facts as the earlier affidavits. Accordingly, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.