

[Cite as *State v. Clark*, 2017-Ohio-899.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 16 MA 0121
V.)	
)	OPINION
DAMON CLARK, JR.,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2007 CR 635 A

JUDGMENT: Affirmed

APPEARANCES:
For Plaintiff-Appellee Paul Gains
Prosecutor
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For Defendant-Appellant Damon K. Clark, Jr. Pro-se
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: March 6, 2017

[Cite as *State v. Clark*, 2017-Ohio-899.]
DONOFRIO, J.

{¶1} Defendant-appellant, Damon Clark, Jr., appeals from a Mahoning County Common Pleas Court judgment denying his motion for leave to file a motion for new trial.

{¶2} This case has a long history with this court. We set out the facts of this case in appellant's direct appeal:

On May 5, 2007, appellant left a party to visit his cousin, Joseph Moreland, at his house on Stewart Street in Youngstown, Ohio. Due to a conflict between appellant and another guest, Joseph Moreland told appellant to leave his home. Joseph pushed appellant causing him to fall and land in a children's power vehicle. Joseph Moreland and appellant then argued.

Appellant then left driving a blue Buick that belonged to the mother of his children but that he often drove. Appellant dropped his brother, Kevon Moreland, and his cousin, Lewon Bell, back off at the party they had previously attended. Rather than reentering the party as intended, appellant left with Stoney Williams, who had approached the Buick. (Kevon Moreland and Lewon Bell had both witnessed Stoney Williams carrying a gun at the party earlier.) Appellant then picked up Stoney Williams' friend, Darryl Mason, who thought he was being transported to the party. However, appellant drove toward Stewart Street instead.

At the time, Joseph Moreland was standing on his front porch speaking to his cousin, Jean Madison, and his aunt, Angela Moreland, who was holding the hand of her three-year-old niece, Cherish Moreland. They had walked over to his house when they heard him arguing with someone on the telephone. Joseph Moreland was concerned because, from statements appellant made when he left the house and additional statements he made over the telephone, it seemed appellant was threatening to come back shooting.

Appellant soon drove down Stewart Street. As the car passed the house, Stoney Williams sat on the door frame of the passenger window and fired two shots across the roof of appellant's vehicle towards Joseph Moreland's house. A bullet grazed Angela Moreland and passed through Cherish's head. Notwithstanding the bullet hole through the back of her head, she awoke crying at the scene. Regrettably, Cherish died less than two days later.

State v. Clark, 7th Dist. No. 08 MA 15, 2009-Ohio-3328, ¶ 2-5.

{¶3} Appellant was convicted in a jury trial of complicity to murder by causing a death as a proximate result of committing a first or second degree felony of violence in violation of R.C. 2903.02(B), knowingly discharging a firearm into or at a habitation in violation of R.C. 2923.161(A)(1), and accompanying firearm specifications. The trial court sentenced him to a total sentence of twenty-five years to life. Appellant appealed to this court. We affirmed appellant's conviction and sentence. *Clark*, 2009-Ohio-3328.

{¶4} On September 4, 2009, appellant filed a pro se motion for new trial asserting that he had newly discovered evidence. Appellant did not state what the evidence was and did not attach a supporting affidavit. The trial court did not rule on this motion.

{¶5} On June 21, 2010, appellant filed a pro se motion for new trial on new evidence. This time he attached a letter from Gerald Johnson. In the letter, Johnson stated "Stoney," appellant's co-defendant, told him about the shooting and that "Littles," whom he came to learn was appellant, was not involved. The letter was not an affidavit. The trial court denied appellant's motion.

{¶6} On January 26, 2011, appellant, this time through counsel, filed a motion for leave to file a motion for a new trial based upon newly discovered evidence. This time Johnson's affidavit was attached to the motion. In the affidavit, Johnson stated that he was at the scene and witnessed Joseph Moreland with a mini assault rifle and heard shots fired.

{¶7} The trial court held a hearing on appellant's motion and, subsequently, overruled it. Appellant filed an appeal with this court. We affirmed the trial court's judgment. *State v. Clark*, 7th Dist. No. 11 MA 38, 2012-Ohio-2434.

{¶8} On April 24, 2015, appellant filed a pro se motion for leave to file a motion for new trial. The trial court denied this motion on November 4, 2015. Appellant filed an appeal from this judgment, but the appeal was later dismissed.

{¶9} On April 30, 2015, appellant filed an application for delayed reopening of the appeal of his conviction under App.R. 26(B). To this application, appellant attached the affidavit of a Henry Edmonds who stated that he spoke with DeJuan Thomas while in jail and that Thomas told him that he saw Joseph Moreland shooting at a vehicle driven by appellant and that Moreland accidentally shot the little girl. This court denied appellant's application for reopening. *State v. Clark*, 7th Dist. No. 08 MA 15, 2015-Ohio-2584.

{¶10} On July 20, 2016, appellant, acting pro se, filed a motion for leave to file motion for new trial. In this motion, appellant stated that a man by the name of Demetrius Williams had prepared an affidavit stating that he was present on Stewart Street with DeJuan Thomas on the night of the shooting. According to appellant's motion, Williams dropped Thomas off at a house on Stewart Street. When Williams returned 15 to 20 minutes later, he saw Thomas exit the house and another man exit ten minutes later. Williams then saw two adults and a little girl walk up the driveway. He also saw a blue car at the corner of the street. Williams then heard the unidentified man (who appellant asserts was Joseph Moreland) who came out of the house say, "there they go right there" while pointing to the blue car. Williams next saw the man lift up an assault rifle and fire shots at the blue car. Williams then saw a woman and little girl fall to the ground. After the woman and girl were already on the ground Williams saw the blue car pass the house and return gunfire.

{¶11} According to appellant's motion, Williams' version of the events that transpired supports the theory that the shots that killed Cherish Moreland and injured Angela Moreland came from the assault rifle and not from the blue car. Appellant

further asserted in his motion that he just became aware of this information in May 2016. He stated that he did not know Williams at the time of his trial. Notably, although appellant's motion references an affidavit prepared by Williams, appellant did not attach a copy of the affidavit to his motion.

{¶12} On July 22, 2016, the trial court overruled appellant's motion for leave to file motion for new trial. Appellant filed a timely notice of appeal on August 5, 2016.

{¶13} Appellant, still acting pro se, now raises a single assignment of error.

{¶14} Appellant's sole assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING
THE APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A
NEW TRIAL.

{¶15} Appellant argues that he proved by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence within the 120-day time limit for a motion for a new trial. Therefore, he asserts the trial court abused its discretion in denying him leave to file a motion for a new trial.

{¶16} A trial court's decision to grant or deny a new trial on grounds of newly discovered evidence is within the court's sound discretion. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). Therefore, we will not reverse such a decision absent an abuse of discretion. Abuse of discretion connotes more than an error of law or judgment; it implies the trial court's judgment was arbitrary, unreasonable, or unconscionable. *State v. Adams*, 62 Ohio St. 151, 157, 56 N.E.2d 654 (1980).

{¶17} In this case, the trial court denied appellant leave to file a delayed motion for new trial. We must examine the timeliness of appellant's motion.

{¶18} Crim.R. 33(B) addresses timeliness when the basis of a new trial motion is newly discovered evidence:

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.

{¶19} Because appellant's motion was filed well outside the 120-day period, he was required to obtain leave of court to file his motion for new trial.

{¶20} 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 (7th Dist.). The moving party must prove unavoidable delay by clear and convincing evidence in order to obtain leave. *Id.* at ¶ 26; Crim.R. 33(B). Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence. *Id.* citing, *State v. Walden*, 19 Ohio App.3d 141, 146, 1483 N.E.2d 859 (10th Dist.1984). The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Fortson*, 8th Dist. No. 82545, 2003-Ohio-5387, ¶ 12.

{¶21} Although appellant references Williams' affidavit in his motion for leave to file a motion for new trial, he did not attach an affidavit. Thus, the trial court was left with nothing to consider but appellant's unsupported allegations.

{¶22} Furthermore, appellant filed this motion over nine years after the shooting. In his motion, appellant makes no mention of when or how he met Williams or how he learned of Williams' alleged witness to the shooting. He only states that he did not know Williams at the time of his trial. Thus, the trial court had no way to

evaluate the timeliness of the motion.

{¶23} Furthermore, in the motion appellant states that Williams was with DeJuan Thomas when he witnessed the shooting. Appellant knew of Thomas at least as early as April 30, 2015, when he filed an application for delayed reopening of his direct appeal. Attached to appellant's April 30, 2015 application was the affidavit of Henry Edmonds who stated that he spoke with Thomas and that Thomas told him that he saw Joseph Moreland shooting at a vehicle driven by appellant and that Moreland was the one who accidentally shot the little girl. Therefore, appellant had known about Thomas and that Thomas claimed he saw Moreland fire the shot that struck Cherish Moreland, which is the same thing appellant claims Williams says he witnessed, for over a year before he filed the present motion. Because appellant knew of Thomas and what he allegedly witnessed and because Thomas was allegedly with Williams, indicates that appellant was not unavoidably prevented from discovering the alleged evidence that is the basis for the present motion.

{¶24} Because appellant did not demonstrate by clear and convincing evidence that he was unavoidably delayed in discovering Williams' alleged testimony, the trial court did not abuse its discretion overruling appellant's motion for leave to file a motion for new trial.

{¶25} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶26} For the reasons set out above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, P.J., concurs.