

[Cite as *State v. Kozic*, 2017-Ohio-4391.]

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

STATE OF OHIO)	
)	
PLAINTIFF-APPELLEE)	
)	CASE NO. 16 MA 0158
VS.)	
)	OPINION
ZOLTAN KOZIC)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2010 CR 506

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee Attorney Paul Gains
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JUDGES:

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

Dated: June 12, 2017

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DeGENARO, J.

{¶1} Defendant-Appellant, Zoltan Kozic, appeals the trial court's judgment denying his motion for leave to file a motion for new trial. As Kozic's argument is meritless the judgment of the trial court is affirmed.

{¶2} This is Zoltan Kozic's third appeal stemming from his convictions and sentence from a rash of burglaries in late 2009 through early 2010 that he committed in four counties with multiple defendants, including his brother and co-defendant Jamie Kozic. In *State v. Kozic*, 7th Dist. No. 11 MA 160, 2014-Ohio-3788 (*Z. Kozic I*), we affirmed most of his convictions and sentence, but reversed two third degree drug trafficking convictions and ordered a limited remand for the trial court to enter convictions on lesser included fourth degree felonies and resentence accordingly. In *State v. Kozic*, 7th Dist. No. 15 MA 215, 2016-Ohio-8556 (*Z. Kozic II*), because the trial court exceeded the scope of our remand in *Z. Kozic I*, we found the trial court erred and remanded the matter a second time for a limited resentencing hearing for the proper advisement and imposition of post-release control. *Z. Kozic II*, ¶ 18.

{¶3} Kozic filed a motion for leave to file a delayed motion for new trial pursuant to Crim.R. 33, which he supported with his own affidavit. On September 26, 2016, the trial court denied the motion.

{¶4} In his sole assignment of error, Kozic asserts:

The procedure by which the trial court employed in dismissing the Appellant's Motion for Leave to File Delayed Motion for New Trial, pursuant to Crim.R. 33(A)(6), was a (sic) abuse of discretion, thereby Due Process under the Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

{¶5} To succeed on a new trial motion on the basis of newly discovered evidence under Crim.R. 33(A)(6), the defendant must show that the new evidence: "(1) raises a strong probability that the result of the case will change if a new trial is granted, (2) has been discovered since the trial, (3) could not have been discovered prior to trial through the exercise of due diligence, (4) is material to the issues, (5) is not cumulative to other known evidence, and (6) does not merely impeach or contradict the other known

evidence." *State v. Dew*, 7th Dist. No. 13 MA 174, 2016–Ohio–274, ¶ 9; *State v. Petro*, 148 Ohio St. 505, 76 N.E. 370 (1947). However, the rule does not require a hearing to resolve the motion. *State v. Billman*, 7th Dist. No. 12 MO 3, 12 MO 5, 2013–Ohio–5774, ¶ 43.

{¶6} The decision to grant or deny a new trial based upon "grounds of newly discovered evidence falls within the sound discretion of the trial court." *State v. LaMar*, 95 Ohio St.3d 181, 2002–Ohio–2128, 767 N.E.2d 166, ¶ 85, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). Similarly, whether a hearing is warranted is within the trial court's discretion. *State v. Mir*, 7th Dist. No. 12 MA 210, 2013–Ohio–2880, ¶ 7. An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal. *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶7} To be timely a motion for new trial based on newly discovered evidence must be filed within 120 days after the verdict. Crim.R. 33(B). If the motion is filed beyond that time frame, the defendant must demonstrate by " 'clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.' '[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. Brown*, 186 Ohio App.3d 309, 2010–Ohio–405, 927 N.E.2d 1133, ¶ 23 (7th Dist.) (internal citations omitted). Many courts have additionally required that motions for leave to file a delayed new trial motion must be made within a reasonable time after discovering the evidence. *Id.* at ¶ 24.

{¶8} Kozic claims that he should be entitled to a new trial because of newly discovered evidence which establishes his innocence. Namely, he attached his own affidavit stating that his co-defendant, Jamie Kozic, admitted at his resentencing hearing to committing the crimes of which Zoltan was convicted. Counsel for Jamie Kozic stated on the record, that his client Jamie said, "[Y]es I did it, and No Zoltan did not." Kozic fails to inform this Court as to why this could not have been discovered earlier.

{¶9} Kozic's argument is meritless because he did not establish that he was unavoidably prevented from filing a motion in a timely fashion. Logic dictates that if Zoltan was actually innocent then he could have explored this defense at the time of the trial when he and Jamie were tried together.

{¶10} Even assuming arguendo that Kozic provided a sufficient reason for the delay, he fails to satisfy the other six criteria specified by the Supreme Court of Ohio to be granted a new trial on the ground of newly discovered evidence. See *Petro*. For example, Kozic's statement merely contradicts testimony given by the witnesses. The State presented testimony from 54 witnesses and admitted 67 exhibits into evidence. *Z. Kozic I*, ¶ 20. The state's principal witness was Barry Stewart who, with the exception of two burglaries in Geauga and Trumbull Counties, had committed each of the burglaries with Zoltan and/or Jamie, including all of the Columbiana and Mahoning County burglaries. He testified in detail how they committed each of the burglaries and where they sold the stolen items. Newly discovered evidence must not merely impeach or contradict the other known evidence, which is exactly what the affidavit does in this matter.

{¶11} Additionally, Zoltan's affidavit is essentially hearsay. He did not attach an affidavit from Jamie or his attorney, nor did he attach a portion of the trial transcript where Jamie's attorney allegedly made the statement regarding Zoltan's innocence.

{¶12} Accordingly, the trial court did not err in denying Kozic's motion. His sole assignment of error is meritless, and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.