

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1304

Appellee

Trial Court No. CR0200403093

v.

Verdell Starks

DECISION AND JUDGMENT

Appellant

Decided: April 8, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Verdell Sparks, pro se.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, pro se, Verdell Starks, appeals from a denial of his motion for a new trial on the basis of newly discovered evidence entered by the Lucas County Court of Common Pleas. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} The relevant facts and partial procedural history of this case were set forth by this court in *State v. Starks*, 6th Dist Nos. L-05-1417, L-05-1419, 2007-Ohio-4897, as follows:

{¶ 3} "On August 23, 2004, an African-American male wearing a wig, baseball cap and large tinted glasses entered a Toledo Cash Advance store. The man pointed what appeared to be a gun wrapped in cloth at the office manager, gesturing to the counter where the money was kept. He said, 'You have three seconds.' The manager opened the cash drawer and handed over a little over \$200. The robber fled.

{¶ 4} "A week later, an African-American male wearing a shoulder length wig came into a Toledo BP station, jumped the counter and grabbed the attendant, pointing a gun at her head. The robber pushed the attendant to the cash register and ordered her to open it. When she did, he grabbed the money, slightly under \$200, ordered the attendant into a back room and fled.

{¶ 5} "On September 26, 2004, a gunman wearing a hooded sweatshirt and large tinted glasses entered a Toledo Sunoco station, telling the attendant that she had ten seconds to open the cash drawer. The man took the bills in the cash drawer, under \$100, and left, telling the attendant to, 'have a good night.'

{¶ 6} "On September 30, 2004, an African-American male carrying a handbag and wearing a blue dress, a wig and tennis shoes entered a South Toledo branch of Sky Bank. With a curved object wrapped in a sock in his right hand, the robber leaped the counter, pushed aside the teller and emptied the contents of her drawer into his handbag.

Following this, he jumped on the counter, stood, turned and told everyone to, 'Have a good day'. He then fled with more than \$1,000.

{¶ 7} "Police and FBI investigating the bank robbery found a sheet of paper in the secure area behind the bank's counter. It was a worker document for one Andrea Starks. Sky Bank ascertained that Andrea Starks was not a customer. A review of bank security photographs revealed that when the robber entered the bank he was carrying a piece of paper. When he left, the paper was no longer visible.

{¶ 8} "Andrea Starks is the spouse of appellant, Verdell Starks. Investigators believed that appellant matched the description given by witnesses in all four robberies. Police assembled a photo array, containing pictures of six men, including appellant, and showed the array to witnesses. Each of the witnesses picked appellant from the array.

{¶ 9} "Appellant was arrested and, in an interrogation with the FBI, confessed to the bank robbery. On October 14, 2004, appellant was named in an indictment charging two counts of aggravated robbery with firearm specifications and two counts of robbery. The indictment included the Sunoco station robbery for which he was eventually convicted. On January 28, 2005, a second indictment was handed down, charging appellant with an additional four counts of aggravated robbery with firearm specifications and four counts of robbery. Included in this indictment were the Sky Bank, Cash Advance, and BP robberies. These cases were consolidated for trial.

{¶ 10} "Appellant pled not guilty and moved to suppress witness identification and his statements to police. He also moved to sever the bank robbery case from the rest of

the charges. The trial court denied appellant's suppression motion, but granted severance. A subsequent motion to sever the remaining armed robbery charges from each other was denied.

{¶ 11} "Following a jury trial, appellant was convicted of the bank robbery. Before trial for the remaining armed robbery charges, appellant dismissed his counsel and elected to proceed as his own trial counsel, with a court-appointed backup counsel to provide aid. Following another jury trial, appellant was found guilty of three counts of aggravated robbery with two firearm specifications.

{¶ 12} "The trial court denied appellant's motion for a new trial and, following a presentence investigation, sentenced him to a four-year period of incarceration for the bank robbery, to be served consecutively to five years for the Sunoco robbery, five years for the BP robbery and two consecutive three-year terms for the firearm specifications. An additional concurrent five-year sentence was imposed for the Cash Advance robbery. The remaining counts in the indictment were dismissed prior to or during trial."

{¶ 13} On July 3, 2008, appellant filed a motion for new trial on the basis of newly discovered evidence in case No. CR05-1209. The motion related to appellant's conviction for aggravated robbery at the Cash Advance store on August 23, 2004. An evidentiary hearing on the matter was held on October 23, 2009. Appellant represented himself at the hearing with standby counsel present. At the hearing, appellant presented affidavits and testimony by Robert Finley and Dennison Bower, III. Finley testified that

he was the person who robbed the Cash Advance store on August 23, 2004, and Bower testified that Finley told him that Finley had robbed the Cash Advance store.

{¶ 14} In an opinion and judgment entry dated June 10, 2010, the trial court denied appellant's motion for new trial, finding that both Finley and Bower's testimony lacked credibility. Specifically, the trial court pointed to inconsistencies in Finley's testimony; the fact that Finley has a lengthy record of convictions of serious crime that significantly impeach his record; the fact that many of Finley's answers came in response to leading questions by appellant; the fact that Finley's affidavit, purportedly prepared by Finley himself, was similar in format to the statements and pleadings submitted by appellant, acting pro se; the questionable nature of the accuracy of Finley's memory; the lack of reasonableness of some of Finley's testimony; and the lack of a prior admission on the part of Finley to the Cash Advance store robbery. The trial court gave no weight to Bower's testimony, because Bower's testimony depended upon Finley's credibility, which the court found to be lacking.

{¶ 15} The trial court pointed out that it had presided over appellant's trial and heard the testimony of the victim in the Cash Advance robbery. In addition, the trial court stated that the victim was a strong witness, who had no doubt that appellant was the man who robbed her. Upon weighing her testimony along with all of the other evidence presented at trial against the newly discovered evidence provided by appellant, the trial court concluded that the evidence did not disclose a strong probability that it would

change the result if a new trial were granted. On that basis, the trial court denied appellant's motion for a new trial. We affirmed this decision on appeal.

{¶ 16} Appellant filed a motion for new trial based on newly discovered evidence in the instant case on June 16, 2010. This motion relates to appellant's conviction for the robbery that occurred at the Toledo Sunoco station on September 26, 2004. For support of this motion, appellant relies upon the same affidavits that he relied upon in support of his motion for new trial in Case No. CR05-1209, that is, upon the affidavits of Finley and Bower.

{¶ 17} The trial court, in denying appellant's motion, relevantly stated the following:

{¶ 18} "* * * This court found in its June 10, 2010 Opinion and Judgment Entry in case no. CR05-1209 that Mr. Finley's testimony was not credible or reasonable and Mr. Bower's testimony was deserving of no weight since Mr. Bower's testimony depended upon Mr. Finley's credibility. Thus, on the authority of the June 10, 2010 Opinion and Judgment Entry, defendant's motion for a new trial in this case must be denied."

{¶ 19} Appellant timely appealed the trial court's judgment entry, raising the following assignments of error:

{¶ 20} I. "The trial court abused its discretion and violated appellant's right to due process as guaranteed by the fifth and fourteenth amendments of the United States Constitution when the trial court denied appellant's motion for new trial based on newly

discovered evidence as not disclosing a strong probability that it will change the result if a new trial is granted."

{¶ 21} II. "The trial court abused its discretion and violated appellant's constitutional right as guaranteed by the fourteenth amendment of the United States constitution when the trial court denied appellant's request for a motion for new consolidated trial based upon newly discovered evidence."

{¶ 22} Because appellant's first and second assignments of error involve overlapping issues, they will be considered together in this analysis. Appellant's argument with respect to these assignments of error is, essentially, that this is a case of mistaken identity. In support of this position, appellant points to the fact that police suspected only one person had committed most of the "similar robberies" that had taken place around the summer of 2004 and that Finley confessed to three to four robberies which happened in 2004.

{¶ 23} In order for a new trial based upon newly discovered evidence to be justified, the newly discovered evidence must satisfy several criteria. That is, a trial court evaluating such a matter must consider whether the new evidence:

{¶ 24} "(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* (1947), 148 Ohio St. 505, syllabus.

{¶ 25} An appellate court will not reverse a trial court's decision concerning a motion for new trial unless there has been a gross abuse of that discretion, which abuse is disclosed by the record. *Id.* at 507-508.

{¶ 26} The law is well-settled that the credibility of witnesses is normally within the province of the trial judge. *State v. Williams*, 2d Dist. No. 19854, 2004-Ohio-3135, ¶ 17. Thus, the trial court may in the exercise of its discretion determine new witness testimony to be false. *Cf. id.* (holding that it is within a trial court's discretion to determine a recantation to be false).

{¶ 27} Here, the trial court reasonably determined, based upon a totality of the circumstances, that the testimony of Finley and Bower -- the same testimony upon which appellant relies in the instant case -- was not credible. In addition, our review of the record reveals that Finley did not assert, either in his affidavit or at the October 23, 2009 hearing, that he committed the Sunoco robbery for which appellant was convicted. Rather, Finley's affidavit and testimony dealt solely with the Cash Advance robbery. Accordingly, we find that the trial court properly determined that the evidence submitted by appellant in support of his motion did not create a strong probability that it would change the result if a new trial were granted.

{¶ 28} For all of the foregoing reasons, appellant's first and second assignments of error are found not well-taken.

{¶ 29} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.