[Cite as *State v. Doogs*, 2020-Ohio-1163.]

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

State of Ohio — Court of Appeals No. WD-19-075

Appellee — Trial Court No. 2013CR0316

v.

Ronald J. Doogs — **DECISION AND JUDGMENT**

Appellant — Decided: March 27, 2020

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellee.

Ronald J. Doogs, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} In this accelerated appeal, appellant, Ronald J. Doogs, appeals the judgment of the Wood County Court of Common Pleas, denying his motion for new trial based upon newly discovered evidence. For the reasons that follow, we affirm.

{¶ 2} In November 2015, appellant was convicted following a jury trial of one count of rape and one count of gross sexual imposition. The trial court sentenced appellant to a total prison term of 12 years and 6 months. Appellant timely appealed his conviction, which we affirmed on July 21, 2017, in *State v. Doogs*, 6th Dist. Wood Nos. WD-15-073, WD-16-027, 2017-Ohio-6914. The Supreme Court of Ohio denied further review on February 28, 2018, in *State v. Doogs*, 152 Ohio St.3d 1408, 2018-Ohio-723, 92 N.E.3d 879.

{¶ 3} Relevant here, on July 11, 2019, appellant filed a motion for leave to file a motion for new trial. In his motion, appellant alleged that a new trial was warranted under Crim.R. 33 due to newly discovered evidence. In particular, appellant claimed that the newly discovered evidence consisted of an affidavit from Brian Smith, a grievance committee investigator, in which Smith heard that appellant's trial counsel was aware of, but failed to object to, the fact that a juror was a relative of an employee of the prosecutor's office.

{¶ 4} The trial court denied appellant's motion for leave on September 11, 2019. In its decision, the trial court reasoned that appellant was not unavoidably prevented from discovering the fact that a member of the jury was the father of a secretary in the prosecutor's office. Further, because the trial court found that appellant's motion and supporting documents did not constitute prima facie evidence of unavoidable delay, the trial court denied appellant's motion without a hearing.

II. Assignments of Error

{¶ 5} Appellant has timely appealed the September 11, 2019 judgment of the trial court, and now asserts four assignments of error for our review:

> 1. The trial court erred and abused its discretion in determining that the defendant-appellant was not unavoidably prevented from discovery of the facts that underlied (sic) his claims.
>
> 2. The trial court erred to the prejudice of the defendant-appellant in sua sponte dismissing the motion for leave to file motion for new trial in violation of the defendant-appellant's absolute right to procedural due process of law thereby granting the State of Ohio a summary judgment.
>
> 3. It was plain error and an abuse of discretion for the trial court not to order and conduct an evidentiary hearing in the case in violation of the defendant-appellant's absolute right to procedural due process of law.
>
> 4. It was plain error and an abuse of the trial court's discretion not to grant the defendant-appellant relief in the case sub judice.

III. Analysis

{¶ 6} We review the trial court's denial of appellant's motion for leave to file a motion for new trial for an abuse of discretion. *State v. Willis*, 6th Dist. Lucas No. L-06-1244, 2007-Ohio-3959, ¶ 12. An abuse of discretion connotes that the trial court's judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 7} In his brief, appellant claims that he is entitled to a new trial because of juror misconduct. Crim.R. 33(A)(2) provides that a new trial may be granted because of misconduct of the jury which materially affects his substantial rights. Crim.R. 33(B) requires that motions for new trial on account of jury misconduct

> shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.[1]

{¶ 8} Here, the verdict was rendered on or around September 10, 2015, thus appellant is clearly beyond the 14-day period. Consequently, appellant must demonstrate by clear and convincing proof that he was "unavoidably prevented from filing his motion for a new trial." *Id.* "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

[1] In the trial court, appellant used the phrase "newly discovered evidence," which implicates Crim.R. 33(A)(6). Although appellant clearly cites juror misconduct in his appellate brief, the result of our analysis would not change if we considered his appeal based upon Crim.R. 33(A)(6), as appellant would similarly have to demonstrate "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely." Crim.R. 33(B).

prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Sandoval*, 6th Dist. Sandusky Nos. S-13-032, S-13-034, 2014-Ohio-4972, ¶ 13, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

{¶ 9} For ease of discussion, we will address appellant's assignments of error out of order.

{¶ 10} In his first assignment of error, appellant argues that the trial court abused its discretion when it found that appellant was not unavoidably prevented from discovery of the facts that supported his claim. We disagree. The trial court reasoned that there is a fundamental "difference between being *unaware* of certain information and being *unavoidably prevented* from discovering it." (Emphasis sic.) *State v. Hiler*, 2d Dist. Montgomery No. 27364, 2017-Ohio-7636, ¶ 10. In this case, appellant claimed in his motion that trial counsel "was aware but failed to object to the fact that an Assistant Wood County Prosecutor's secretary's father served on the defendant's trial jury." Thus, because his own counsel was aware of the relationship, it is reasonable to conclude that appellant was not unavoidably prevented from discovering that fact.

{¶ 11} On appeal, appellant now contradicts his claim in the trial court, and asserts that his trial counsel was not aware that one of the jurors was related to someone in the prosecutor's office. However, "[a]ppellant cannot change the theory of his case and present these new arguments for the first time on appeal." *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992).

{¶ 12} Therefore, we hold that the trial court did not abuse its discretion in finding that appellant was not unavoidably prevented from discovering the facts on which his claim is based.

{¶ 13} Furthermore, we find that the trial court did not abuse its discretion in denying appellant's motion without a hearing. "A defendant is entitled to a hearing on his motion for leave if he submits 'documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence' at issue." *State v. Clyde*, 6th Dist. Erie No. E-18-016, 2019-Ohio-302, ¶ 13, quoting *State v. Gray*, 8th Dist. Cuyahoga No. 94282, 2010-Ohio-5842, ¶ 20. Here, the affidavit attached to appellant's motion, while purportedly demonstrating the underlying fact that the juror was related to someone in the prosecutor's office, does not in any way demonstrate how appellant was unavoidably prevented from timely discovering that fact.[2] Therefore, we hold that the trial court did not abuse its discretion in denying appellant's motion without a hearing.

{¶ 14} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 15} In his fourth assignment of error, appellant argues that this case presents a clear case of juror misconduct. Appellant argues that it is black-letter law that a juror's failure to honestly respond to a material question during voir dire entitles the defendant to a new trial. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104

[2] The affidavit provides the hearsay statement: "On May 18, 2016 I spoke with Wood County Prosecutor Thomas Matuszak and the following information was provided: * * * Prosecutor Matuszak raised the issue of why [appellant's trial counsel] did not object to a relative of the prosecutor's office serving on the jury."

S.Ct. 845, 78 L.Ed.2d 663 (1984) ("[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."). Here, however, the juror did not fail to honestly answer a question. In fact, in response to the question of whether he knew anyone involved in the trial, the juror honestly answered that he knew and had worked with appellant's trial counsel for many years. The juror was never asked if he was related to anyone in the prosecutor's office. Therefore, we find appellant's argument that this is a clear case of juror misconduct to be without merit.

{¶ 16} Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 17} Finally, appellant's second assignment of error argues that the trial court effectively granted summary judgment contrary to the standard set forth in Civ.R. 56(C). Likewise, appellant's third assignment of error urges us to apply the standard for civil postconviction proceedings, and reverse the trial court because it denied appellant's motion without a hearing where he alleged claims that, if true, would render his conviction void.

{¶ 18} In so arguing, appellant relies on Crim.R. 57(B), which provides, "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Here,

however, the procedure to request a new trial is specifically provided for in Crim.R. 33. Thus, Crim.R. 57(B) does not apply, and it is improper to examine appellant's claims under the rules of civil procedure.

{¶ 19} Accordingly, appellant's second and third assignments of error are not well-taken.

IV. Conclusion

{¶ 20} For the foregoing reasons, we find that substantial justice has been done the party complaining, and the judgment of the Wood 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J.
CONCUR. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCURS AND WRITES JUDGE
SEPARATELY.

ZMUDA, P.J., concurring.

{¶ 21} I agree with the majority's analysis under appellant's fourth assignment of error, and I therefore conclude that appellant failed to present a prima facie case of juror misconduct that would warrant the granting of leave to file his motion for new trial. On that basis alone, I would affirm the trial court's denial of appellant's motion for leave. Such determination is dispositive of this appeal and does not warrant or require this court's consideration of appellant's remaining assignments of error. *See State v. Doren*, 6th Dist. Wood No. WD-06-064, 2009-Ohio-1667, ¶ 144 ("Doren's second assignment of error is well-taken. As this assignment of error is dispositive of the appeal, the remaining assignments of error are moot."). With this clarification in mind, I concur.