

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-133
 : (C.P.C. No. 07CR-4563)
 Kim L. Anderson, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on October 11, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Kim L. Anderson, pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶1} Defendant-appellant, Kim L. Anderson, appeals pro se from a judgment of the Franklin County Court of Common Pleas denying his motion for leave to file a delayed motion for a new trial. Appellant further appeals the denial of his motion for new trial which he filed despite not having first obtained leave for its filing. For the following reasons, we affirm.

I. Facts and Procedural History

{¶2} On October 3, 2008, a jury found appellant guilty of multiple offenses including engaging in a pattern of corrupt activity, complicity to commit theft, complicity to commit forgery, and money laundering. The convictions resulted from appellant's participation in a mortgage fraud scheme that involved six properties and defrauded mortgage lenders of over \$1 million. On November 6, 2008, the trial court sentenced

appellant to a total of 15 years in prison and advised him of a future period of post-release control.

{¶3} On appeal, this court affirmed appellant's convictions and sentence. *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566.

{¶4} On January 4, 2011, appellant filed in the trial court a "Motion for Leave to File Delayed Motion for New Trial Pursuant to Crim.R. 33(B)" as well as a "Motion for New Trial pursuant to Criminal Rule 33(A)(2) [and] (6)." In support of his motions, appellant asserted that, on August 21, 2010, he received a letter from a title company dated August 17, 2010, that was accompanied by several pages of documents relative to a 2006 proposed transaction of real property located at 3717 Mason Road, Canal Winchester, Ohio that never closed. He claimed that the documents, sent to him from a title company, support his claim of innocence in that they demonstrate that one of the state's key witnesses perjured herself at trial. Appellant asserted that the documents would have changed the outcome of the trial and that the state received this information and intentionally suppressed it from the defense. Appellant further alleged that the prosecution engaged in misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in withholding relevant evidence and knowingly permitting state witnesses to lie to the court under oath. He supported these allegations with his own affidavit dated December 6, 2010.

{¶5} The trial court found that the proffered evidence was not newly discovered in that appellant had acknowledged that he "remembered" the Mason Road transaction at some point after trial,¹ justifying the conclusion that he had previously been aware of it. The court further observed that appellant acknowledged in his motions that he had received the alleged newly discovered evidence on August 23, 2010—134 days prior to the filing of his motions on January 4, 2011. The court denied appellant's motion for leave to file an untimely motion for new trial for two reasons: "first, [the evidence] is not 'newly discovered' and second, his Motion is not timely." (Dec. 6, 2011 Decision at 2.)

{¶6} Accordingly, the trial court did not issue an order stating that appellant had been unavoidably prevented from timely filing a motion for new trial, overruled

¹ In his brief in this court, appellant asserts that he remembered the Mason Road transaction while assisting appellate counsel with his direct appeal. The record of that appeal reflects that, on July 30, 2009, appellant

appellant's motion for leave, and found it unnecessary to address the merits of appellant's motion for new trial. It nevertheless did address appellant's arguments as presented in his motion for new trial and found them to lack merit.

{¶7} Appellant timely appeals, asserting four assignments of error which we summarize as follows:

1. The trial court abused its discretion and erred in denying appellant leave to file a motion for new trial based on the trial court's determination that appellant did not timely file his motion for leave.
2. The trial court erred in denying appellant's motion seeking a new trial based on alleged prosecutorial misconduct.
3. The trial court erred in denying appellant's motion seeking a new trial based on his assertion that the jury's verdict was not supported by the sufficiency of the evidence.
4. The trial court abused its discretion and erred in denying appellant's motion seeking a new trial based on his assertion that the state's witness had engaged in misconduct resulting in a miscarriage of justice and denial of a fair trial.

{¶8} This court has previously noted that appellant, following the disposition of his appeal, "inundated the trial court with repetitive motions and filings, including an affidavit to disqualify respondent. * * * The trial court has considered these filings with admirable patience, but recently noted: 'Should [relator] continue to file motions that attempt to re-litigate his conviction, which are now barred based upon the affirmance of his criminal conviction AND the denial of his de facto post-conviction relief filings, the Court will be compelled to consider asking its statutory counsel to bring vexatious litigator proceedings against this [appellant], and/or consider the imposition of sanctions.'" (Emphasis sic.) *State ex rel. Anderson v. Sheeran*, 10th Dist. No. 11AP-990, 2012-Ohio-2949, ¶ 7.

II. Analysis

{¶9} We apply an abuse-of-discretion standard in reviewing the court's denial of appellant's motion for leave to file a delayed motion for new trial. *State v. Townsend*,

filed his reply brief in his direct appeal to this court in case No. 08AP-1060. Accordingly, we infer that appellant must have "remembered" the Mason Road transaction sometime prior to August 2009.

10th Dist. No. 08AP-371, 2008-Ohio-6518. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶ 4, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 14.

{¶10} Subsection (A)(2) of Crim.R. 33 authorizes the grant of a new trial based on "[m]isconduct of the jury, prosecuting attorney, or the witnesses for the state" that materially affects the defendant's substantial rights. Subsection (A)(6) of Crim.R. 33 authorizes the grant of a new trial based on the discovery of new material evidence "which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶11} Crim. R. 33(B) imposes time limits for the filing of a motion for a new trial, as follows:

Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, 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.

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.

(Emphasis added.)

{¶12} This court has previously summarized the conditions an appellant must meet in order to be entitled to leave to file a delayed motion for new trial:

To obtain leave to file a motion for new trial based upon prosecutorial misconduct, appellant must demonstrate "by clear and convincing proof" that he was "unavoidably prevented" from filing the motion within the 14-day time period. Crim.R. 33(B). To obtain leave to file a motion for a new trial based on newly discovered evidence, appellant must demonstrate by "clear and convincing proof" that he was "unavoidably prevented" from discovering the evidence relied upon to support the motion within the 120-day time period. "[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. Walden* (1984), 19 Ohio App.3d 141, 145-46, 483 N.E.2d 859.

State v. Golden, 10th Dist. No. 09AP-1004, 2010-Ohio-4438, ¶ 9. (Emphasis added.)

{¶13} Appellant acknowledges that he first received the alleged material new evidence on August 23, 2010, which was clearly past the 120-day time limit of Crim.R. 33(A). Indeed, August 23, 2010 was 690 days from the date that the jury returned its guilty verdicts and 470 days past the deadline for the filing of his motion for leave. Thus, in the absence of an order recognizing that appellant had been unavoidably prevented from discovering the evidence at issue within 120 days from the verdict, appellant was not entitled to determination of the merits of his motion for new trial. Appellant argues that he was, in fact, unavoidably prevented from discovering the evidence within 120 days of the verdict because he "was in the custody of the State of Ohio," (appellant's reply brief at 2), and the title agency did not respond in a timely manner to his request for the information.

{¶14} The trial court, however, clearly rejected the proposition that appellant had provided "clear and convincing proof" that he was "unavoidably prevented" from discovering information relative to the Mason Road transaction until August 20, 2010.

The court cited appellant's memorandum in support of his motion for leave in which appellant acknowledged that "[i]t was after trial," that appellant "remembered" the real estate transaction and that, at that time, he began his attempts to secure evidence concerning it. But the phrases in Crim. R. 33(B) requiring an appellant to show by "clear and convincing proof" that he or she was "unavoidably prevented" from discovering evidence do not allow one to claim that evidence was undiscoverable simply because the defense did not undertake efforts to obtain the evidence sooner. As in *Golden*, appellant "fails to explain why neither he nor his trial counsel could have timely discovered" the allegedly new evidence, through subpoena or otherwise, at an earlier point in time. *Golden* at ¶ 15. Bald assertions that appellant could not have timely discovered the evidence is not enough. *Id.* Moreover, criminal defendants and their trial counsel have a duty to make a "serious effort" of their own to discover potential favorable evidence. *Id.*

{¶15} Accepting for purpose of argument appellant's assertion that he did not "remember" the Mason Road transaction until sometime prior to August 2009, appellant failed to procure the documents relative to that transaction for another year. Nor does appellant provide a credible explanation as to why the real estate transaction and its alleged importance escaped his memory until so long after trial.

{¶16} We therefore conclude that, under the facts of this case, the trial court did not abuse its discretion in implicitly finding that appellant either had knowledge of the grounds supporting his motion for new trial, or could have learned of the existence of those grounds in a timely manner in the exercise of reasonable diligence. Accordingly, the trial court did not abuse its discretion in refusing to issue an order recognizing that appellant had been unavoidably prevented from discovering the evidence at issue at a time within the 120-day period established by Crim.R. 33(B).

{¶17} Further, a "'trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.'" *Golden* at ¶ 18, quoting *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 37. As observed by the Seventh District Court of Appeals:

While Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence. *State v. Griffith*, 11th Dist. No. 2005-T-

0038, 2006–Ohio–2935, ¶ 15. *See also State v. Berry*, 10th Dist. No. 06AP–803, 2007–Ohio–2244, ¶ 37; *State v. Willis*, 6th Dist. No. L–06–1244, 2007–Ohio–3959, ¶ 20; *State v. Newell*, 8th Dist. No. 84525, 2004–Ohio–6917, ¶ 16; *State v. Stansberry*, 8th Dist. No. 71004, 1997 WL 626063 (Oct. 9, 1997).

State v. Wilson, 7th Dist. No. 11 MA 92, 2012-Ohio-1505, ¶ 57 (also adopting the rule).

{¶18} Appellant acknowledges that 134 days passed from his receipt of the real estate documents on August 20, 2010 and the filing of his motions. He nevertheless asserts that the timing of the filing of his motion was reasonable in light of his current incarceration. The trial court disagreed. In view of the fact that Crim.R. 33(B) establishes an initial 120-day period to file a motion for a new trial based on newly discovered evidence, and under the particular facts of this case, the trial court did not abuse its discretion in concluding that appellant had not filed his motion within a reasonable time after discovery of the evidence.

III. Conclusion

{¶19} The trial court did not abuse its discretion nor err in denying appellant's motion for leave to file his untimely motion for new trial and in failing to issue an order finding that appellant had been unavoidably prevented from discovering within 120 days of the verdict the evidence at issue concerning the Mason Road real estate transaction. We therefore overrule appellant's first assignment of error.

{¶20} In the absence of such an order, the trial court had no obligation to determine the merits of appellant's motion for a new trial. Appellant's assignments of error two through four, which assert error in denial of the motion for new trial, are therefore moot. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
