[Cite as *State v. Gover*, 2013-Ohio-3366.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-777
v.	:	(C.P.C. No. 05CR-04-2375)
Michael A. Gover,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 1, 2013

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

Michael A. Gover, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Michael A. Gover ("defendant"), appeals the August 15, 2012 judgment entry and order of the Franklin County Court of Common Pleas, which denied defendant's motion for new trial and dismissed his fourth petition for post-conviction relief. Finding that the trial court did not abuse its discretion, defendant's assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The facts and procedural history of this case were sufficiently set forth in our prior decision ruling on defendant's direct appeal from his convictions. There, we explained the events which gave rise to this case as follows:

The charges in this case arose out of the stabbing death of Jason Schmalenberger ("Schmalenberger") that occurred on April 3, 2005, near the intersection of State Route 317 and Parsons Avenue in Franklin County, Ohio. The autopsy revealed approximately six stab wounds to Schmalenberger, two to the front of his chest, one to his left, front thigh, one to his right foot, one to his left buttock, and one to his left, back thigh. The chain of events leading up this incident were adduced at trial, and are summarized in the following paragraphs.

On April 2, 2005, Amber Weakley, Jerry Weakley's ("Weakley") sister, had a party at Weakley's residence. Among the guests at the party were appellant, Charles Dickerson ("Dickerson"), Sirquan Allen ("Allen"), Melvin Taylor ("Taylor"), and appellant's girlfriend Amanda Fisher ("Fisher"). After the party, the named individuals spent the night at Weakley's. The next day, Weakley decided to give all of them a ride home in his girlfriend's car, a blue Topaz. Weakley, accompanied by appellant, Fisher, Dickerson, Allen, and Taylor, stopped at a convenient store, and then proceeded to Fisher's house near Parsons Avenue. Fisher got out of the car and Weakley and the remaining passengers drove away. However, they returned to Fisher's house twice because of items she had left in the car. When leaving Fisher's house for the final time, Weakley was driving, Allen was in the front passenger's seat, appellant, Taylor, and Dickerson were all in the back seat, appellant being seated behind Weakley.

Weakley was traveling on a residential street with cars parked on both sides, when he came in contact with a van traveling in the opposite direction that had "Co-Vad" written on its side. According to the testimony of the car's occupants, the van swerved in their direction, causing Weakley to swerve to avoid a collision. Weakley described that everyone in the car got a little agitated, and some occupants started yelling. One of the occupants stated that the van's driver "should get his ass kicked." (Tr. at 216.) Appellant told Weakley to "turn around," and said things like, "let's go get him." *Id*. According to Dickerson, though the conversation in the car was "what the hell happened?" and "go follow them," appellant was the loudest of the group and "pretty insistent" about turning around to follow the van. (Tr. at 392.) In response to the van's alleged swerving, appellant said, "Fuck that. Don't nobody play me. Turn around." (Tr. at 391.) Appellant also stated, "I'm going to get that mother fucker." (Tr. at 488.) Though

Weakley hesitated about turning around, according to Dickerson, appellant kept insisting, and after about thirty seconds, Weakley complied.

There were two, possibly three cars in front of Weakley as he caught up to the van. At an intersection, the cars turned off leaving the Topaz directly behind the van. Weakley sped up and proceeded to pass the van on Parsons Avenue. At the next stop sign, Weakley stopped, and everyone, except for Weakley, exited the car. Appellant went to the van's driver's side, and appeared to start fighting with the driver, Schmalenberger, while another man held the passenger side door shut. The men thought that it was a fistfight, but at some point, it was discovered that Schmalenberger had been stabbed a number of times with a knife. According to Franklin County Deputy Coroner, Dr. Collie Trent, Schmalenberger died as a result of two stab wounds that penetrated his heart and the area around it. During the altercation, Schmalenberger's cousin, Rick Rice ("Rice"), who was the passenger in the van called 911.

Immediately after the fight, the four individuals ran back to the Topaz, and they fled. During this time, according to Weakley, appellant stated, "I'm a killer, I'm a killer." (Tr. at 223.) As a police car pulled up behind the Topaz and activated its siren, Weakley pulled off into a parking lot, whereupon appellant attempted to give the knife to Dickerson, who refused to take it. Thereafter, appellant opened the car door and dropped the knife into the parking lot. The police then approached the Topaz with guns drawn and all the occupants were taken into custody. A search of the area resulted in finding a bloody knife in the parking lot. Excluding appellant, all of the car's occupants testified at trial that appellant was the only one involved in the physical altercation with Schmalenberger, and that appellant had a bloody knife in his possession after the confrontation.

According to Rice, he and Schmalenberger were on their way to play golf on the afternoon of April 3, 2005, when they were passed by a blue Topaz driving very fast. At the stop sign, the occupants of the Topaz got out and began running towards the van. Rice tried to get out, but one man held the door shut. Appellant pulled Schmalenberger's door open and Rice saw Schmalenberger getting punched and trying to push appellant away. Rice heard appellant say, "Give me my knife" three times. (Tr. at 794.) At this point, Rice did not know that

> Schmalenberger was getting stabbed. Rice was calling 911 as Schmalenberger was asking for help. Rice tried to jab appellant with an "ink-pen-looking device" that was in the van's console, but to no avail. As he stayed on the line with 911, the four men ran back to the Topaz, and Rice told Schmalenberger to follow them. Schmalenberger did so for a few hundred yards, but then Schmalenberger looked at Rice and said, "I am not doing so good." (Tr. at 795.) Schmalenberger fell over as the van coasted into the guardrail, and at this time, Rice realized that Schmalenberger had been stabbed. Rice held Schmalenberger until the ambulance arrived.
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> On April 12, 2005, appellant was indicted by a Franklin County Grand Jury on one count of aggravated murder, with prior calculation and design, one count of murder, during the course of a felony, and one count of tampering with evidence, to wit: a knife. The aggravated murder and murder charges carried repeat violent offender ("RVO") specifications alleging that appellant had a prior conviction for voluntary manslaughter. The case proceeded to jury trial. Appellee requested, and received, a nolle prosequi on the murder charge. The jury found appellant guilty as charged of aggravated murder and tampering with evidence. Pursuant to appellant's jury waiver regarding the RVO specification, the matter was tried to the court, and the trial judge found appellant guilty of the RVO specification. The trial court sentenced appellant to life without parole on the aggravated murder charge, consecutive to a ten-year term on the RVO specification, and consecutive to a five-year term on the tampering with evidence charge. Appellant timely appealed.

State v. Gover, 10th Dist. No. 05AP-1034, 2006-Ohio-4338, ¶ 2-8.

{¶ 3} Defendant asserted the following two assignments of error in his direct appeal: (1) that the trial court erred in overruling his motion for acquittal, and (2) that the trial court erred by refusing to give defendant's requested jury instruction on the lesser included offense of voluntary manslaughter. This court overruled defendant's assignments of error.

{¶ 4} Defendant has previously filed three petitions for post-conviction relief, which have all been denied.

{¶ 5} On June 10, 2012, defendant filed his fourth petition for post-conviction relief. Plaintiff-appellee, State of Ohio ("State"), filed an answer and motion to dismiss

the petition. On June 20, 2012, defendant filed a motion for new trial, which the State opposed.

{¶ 6} On August 15, 2012, the trial court denied the motion for new trial and the petition for post-conviction relief. The trial court noted that defendant's motion for new trial was untimely, and thus barred by Crim.R. 33(D), and that defendant had not demonstrated that he had been unavoidably prevented from learning of the 911 call. The trial court dismissed defendant's fourth petition for post-conviction relief noting that it was untimely and that the doctrines of waiver and res judicata applied.

II. ASSIGNMENTS OF ERROR

{¶ 7} Defendant appeals, assigning the following errors:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR NEW TRIAL PURSUANT TO CRIM.R. 33.
>
> [II.] TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILURE TO USE THE MENTAL HEALTH EXPERT FOR THE N.G.R.I. THAT HE REQUESTED.

III. ANALYSIS

A. Motion for New Trial

{¶ 8} We will not disturb a trial court's decision granting or denying a Crim.R. 33 motion for new trial absent an abuse of discretion. *State v. Schiebel,* 55 Ohio St.3d 71, 76 (1990). The abuse of discretion standard of review also applies to Crim.R. 33(B) motions for leave to file a delayed motion for new trial. *State v. Townsend*, 10th Dist No. 08AP-371, 2008-Ohio-6518, ¶ 8. Abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} Crim.R. 33(B) provides in relevant part:

> 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.

{¶ 10} Under Crim.R. 33(B), a motion for a new trial must be made within 14 days after the entry of judgment or, when the motion concerns newly discovered evidence, within 120 days after the day the verdict was rendered. Inasmuch as defendant filed his motion well outside the 120-day period, he was required to obtain leave of court to file his motion for new trial. 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, ¶ 25 (7th Dist.). The moving party must prove unavoidable delay by clear and convincing evidence in order to obtain leave. *State v. Bates*, 10th Dist. No. 09AP-583, 2009-Ohio-6422, ¶ 13; Crim.R. 33(B). Unavoidable delay results when 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 required time in the exercise of reasonable diligence. *State v. Walden*, 19 Ohio App.3d 141, 146 (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.

{¶ 11} Defendant asserts that he was unavoidably prevented from discovering evidence of a 911 tape. However, the 911 call made by Rick Rice was discussed in this court's original decision overruling defendant's direct appeal of his convictions. As such, both defendant and his attorney were aware of the 911 call, and defendant has not demonstrated unavoidable prevention for purposes of Crim.R. 33.

{¶ 12} In short, defendant failed to obtain leave of court or otherwise demonstrate that he was unavoidably prevented from discovering the evidence regarding the 911 call before filing his motion for new trial.

B. Petition for Post-conviction Relief

{¶ 13} The right to seek post-conviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 14} Post-conviction petitions must also be timely. Under R.C. 2953.21(A)(2), petitions must be filed "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction." Alternatively, "[i]f no appeal is taken, * * * the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

{¶ 15} Defendant did file a direct appeal and, as noted previously, has already filed three petitions for post-conviction relief. This fourth petition is clearly untimely. When a post-conviction petition is untimely, the trial court lacks jurisdiction to consider it, unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). *See State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶ 8; *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8; *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶ 5; and *State v. Soulivong*, 10th Dist. No. 11AP-12, 2011-Ohio-3601, ¶ 11.

{¶ 16} A trial court may consider an untimely petition if the petitioner shows: (1) he was unavoidably prevented from discovering the facts upon which he relies to present the claim for relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner, and the petition asserts a claim based on that right. *See* R.C. 2953.23(A)(1)(a). In addition to demonstrating one of these

two circumstances, the petitioner must also show by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offense upon which he was convicted. *See* R.C. 2953.23(A)(1)(b). Alternatively, the trial court could also consider an untimely petition if the petitioner presented DNA evidence establishing his actual innocence by clear and convincing evidence. *See* R.C. 2953.23(A)(2).

{¶ 17} Here, defendant has neither made arguments nor presented evidence to demonstrate that one of the exceptions found in R.C. 2953.23(A) applies to his case. Furthermore, nothing within R.C. 2953.23 permits an extension of time to file a petition for post-conviction relief.

{¶ 18} Because defendant's application was not timely filed, and because defendant has not met one of the exceptions which could overcome this jurisdictional bar, we find the trial court properly denied defendant's petition for post-conviction relief as untimely.

IV. CONCLUSION

{¶ 19} In the final analysis, the trial court properly denied defendants untimely motion for new trial and untimely petition for post-conviction relief. Accordingly, defendant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and BROWN, JJ., concur.

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