[Cite as *State v. Ambartsoumov*, 2013-Ohio-3011.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-878
v.	:	(C.P.C. No. 08CR-07-5039)
Garri Ambartsoumov,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	
State of Ohio,		
	:	Nos. 12AP-877
Plaintiff-Appellee,		(C.P.C. No. 08CR-07-5040)
	:	12AP-889
v.		(C.P.C. No. 09CR-03-1753)
	:	
Eldar Z. Veliev,		(REGULAR CALENDAR)
	:	
Defendant-Appellant.		
	:	

D E C I S I O N

Rendered on July 11, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee.

Keith A. Yeazel, for appellants.

APPEALS from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶ 1} In these consolidated appeals, defendants-appellants, Eldar Z. Veliev and Garri Ambartsoumov, challenge judgments of the Franklin County Court of Common Pleas denying their amended motions for leave to file a delayed motion for new trial.

{¶ 2} On July 11, 2008, appellants were each indicted on one count of felonious assault, in violation of R.C. 2903.11. On March 24, 2009, appellants were each indicted on one count of attempted murder, in violation of R.C. 2923.02. The indictments arose out of an incident occurring May 17, 2008, in which two individuals, Tigran Safaryan and Arut Koulian, received knife wound injuries outside a Columbus restaurant, Hawa Russia, a Russian club located on East Dublin Granville Road, Columbus.

{¶ 3} Appellants were jointly tried before a jury beginning August 24, 2009. Following deliberations, the jury returned verdicts finding appellant Veliev (individually "Veliev") guilty of felonious assault and attempted murder, while the jury found appellant Ambartsoumov (individually "Ambartsoumov") guilty of felonious assault.

{¶ 4} Both appellants filed appeals from their convictions. In *State v. Ambartsoumov*, 10th Dist. No. 09AP-1054, 2010-Ohio-6293, this court affirmed Ambartsoumov's conviction; this court affirmed Veliev's convictions in *State v. Veliev*, 10th Dist. No. 09AP-1059, 2010-Ohio-6348. Appellants appealed their convictions, and the Supreme Court of Ohio declined to grant discretionary review. *See State v. Ambartsoumov*, 128 Ohio St.3d 1461, 2011-Ohio-1829; *State v. Veliev*, 128 Ohio St.3d 1461, 2011-Ohio-1829.

{¶ 5} On March 17, 2011, appellants filed applications for reopening, pursuant to App.R. 26(B), alleging ineffective assistance of appellate counsel. This court subsequently denied appellants' applications for reopening. Appellants appealed from this court's decisions, and the Supreme Court declined to accept the appeals. *See State v. Ambartsoumov*, 131 Ohio St.3d 1486, 2012-Ohio-1143; *State v. Veliev*, 131 Ohio St.3d 1542, 2012-Ohio-2025.

{¶ 6} On April 18, 2012, Veliev filed motions in common pleas case Nos. 08CR-5040 and 09CR-1753 for leave to file a delayed motion for new trial, alleging he had discovered new evidence indicating that several individuals, other than himself and co-defendant Ambartsoumov, had committed the offenses. Ambartsoumov filed an identical motion with the trial court in common pleas case No. 08CR-5039. Attached to the motions were various affidavits, including those of Irina Stevens, Artur Melkumov, and Irina Melkumov, who each stated they had witnessed the incident. One of these individuals, Artur Melkumov, stated he was interviewed by a police officer at the restaurant following the incident and that he "told the police [he] did not see anything"

because he was afraid of retaliation, but that he "decided to come forward now because Eldar did not cut Arut." The other two individuals, Irina Stevens and Irina Melkumov, averred in their affidavits that they witnessed the incident but did not come forward sooner because of fear of retaliation. Also attached to Veliev's motions was his own affidavit, as well as the affidavits of Ambartsoumov, Steven Palmer (Veliev's trial counsel), and Samuel Shamansky (Ambartsoumov's trial counsel). Ambartsoumov's motion also included his own affidavit, as well as the affidavits of Veliev, Palmer, and Shamansky.

{¶ 7} The state filed responses to appellants' motions, arguing that all three witnesses were on the state's trial witness list and, therefore, they were known to defense counsel at the time of trial. Appellants filed amended motions for leave, arguing that, if disclosure had occurred, appellants' former trial counsel must have rendered ineffective assistance of counsel for failing to investigate and/or call those witnesses to testify. Appellants further argued that the state must have committed a *Brady [v. Maryland*, 373 U.S. 83 (1963)] violation by hiding exculpatory witnesses. By entries filed September 12 and October 9, 2012, the trial court denied appellants' amended motions for leave to file a delayed motion for new trial.

{¶ 8} On appeal, appellants set forth the following identical two assignments of error for this court's review:

> FIRST ASSIGNMENT OF ERROR:
>
> The trial court erred in denying defendant's motions for leave to file a delayed motions for a new trial.
>
> SECOND ASSIGNMENT OF ERROR:
>
> The trial court erred when it failed to conduct an evidentiary hearing to resolve disputed issues of fact.

{¶ 9} Appellants' assignments of error are interrelated and will be considered together. Under their first assignment of error, appellants assert that the trial court erred in denying their motions for leave to file a delayed motion for new trial. Appellants contend they were unavoidably prevented from filing a motion for new trial within the time periods set forth in Crim.R. 33 and that their motions for leave were filed within a reasonable time after discovering the facts contained in the affidavits of the witnesses.

Under their second assignment of error, appellants assert the trial court erred in failing to conduct an evidentiary hearing to resolve disputed issues of fact.

{¶ 10} An appellate court applies an abuse of discretion standard in reviewing a trial court's denial of a motion for leave to file a delayed motion for new trial. *State v. Anderson,* 10th Dist. No. 12AP-133, 2012-Ohio-4733, ¶ 9. Crim.R. 33(A)(6) states in part that a new trial may be granted "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Motions for new trial based upon newly discovered evidence must be timely filed. *State v. Brown,* 186 Ohio App.3d 309, 2010-Ohio-405, ¶ 22 (7th Dist.).

{¶ 11} Crim.R. 33(B) states in part:

> 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.

{¶ 12} Thus, "Crim.R. 33(B) provides a mechanism for allowing a new trial motion based on newly discovered evidence to be reviewed by the trial court beyond the prescribed one hundred twenty day time limit." *State v. Shakoor,* 7th Dist. No. 10 MA 64, 2010-Ohio-6386, ¶ 16. A defendant is to file a motion for leave, and must "show by clear and convincing proof that he has been unavoidably prevented from discovering, within the one hundred twenty day time limit, the evidence that he is relying on to support his motion for 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 prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden,* 19 Ohio App.3d 141, 145-46 (10th Dist.1984). Further, "[m]ost courts * * * also require defendants to file a motion for leave within a reasonable time after discovering the evidence." *State v. Peals,* 6th Dist. No. L-10-1035, 2010-Ohio-5893, ¶ 22, citing *State v. Grinnell,* 10th Dist. No. 09AP-1048, 2010-Ohio-3028.

{¶ 13} A trial court's decision "whether to conduct an evidentiary hearing on a motion for leave to file a motion for a new trial is discretionary and not mandatory." *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶ 54. A criminal defendant "is only entitled to a hearing on a motion for leave to file a motion for a new trial if he submits documents which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *Id.*, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 7 (2d Dist.). Thus, "no such hearing is required, and leave may be summarily denied, where neither the motion nor its supporting affidavits embody prima facie evidence of unavoidable delay." *Peals* at ¶ 23.

{¶ 14} In order to prevail on a motion for new trial based upon newly discovered evidence, a defendant must show that the new evidence (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*, 148 Ohio St. 505 (1947). However, a trial court "may not * * * 'consider the merits of the motion for a new trial until it makes a finding of unavoidable delay.' " *Peals* at ¶ 21, quoting *State v. Lanier*, 2d Dist. No. 2009 CA 84, 2010-Ohio-2921, ¶ 17. Accordingly, " 'unless a trial court has granted a defendant leave to file a delayed motion for new trial, the motion for a new trial is not properly before the court.' " *Peals* at ¶ 21, quoting *State v. Clumm*, 4th Dist. No. 08CA32, 2010-Ohio-342, ¶ 26.

{¶ 15} As noted under the facts, appellants submitted the affidavits of three individuals who each averred that they were at the restaurant on the night of the incident and observed individuals other than Veliev and Ambartsoumov commit the offenses. Each of these witnesses stated they were afraid to come forward for fear of retaliation, and one of the witnesses stated that he told a police officer at the scene that he did not observe anything that night.

{¶ 16} Appellants also submitted the affidavit of Palmer, trial counsel for Veliev, in which Palmer stated he had reviewed the affidavits of Irina Stevens, Artur Melkumov, and Irina Melkumov, and that "[a]t no time" did these witnesses "tell me" they were outside the restaurant on May 17, 2008 during the incident, and that "[a]t no time did [they] tell me" their version of how the stabbings took place. Palmer averred that "[t]he first time I

heard this information was when Ambartsoumov's present attorney provided me with the affidavit in 2012." The affidavit of Shamansky, trial counsel for Ambartsoumov, contained almost identical statements as those set forth in Palmer's affidavit.

{¶ 17} The affidavit of Veliev states that he had reviewed the affidavits of Irina Stevens, Artur Melkumov, and Irina Melkumov and that "[a]t no time" did these witnesses "tell me" that they were outside the restaurant on the evening of May 17, 2008, and "[a]t no time" did they relate to him their version of the stabbings. According to Veliev, "[t]he first time I heard this information was when my present attorney told me about it in 2011." Ambartsoumov submitted an almost identically worded affidavit.

{¶ 18} The trial court found that appellants had not demonstrated, by clear and convincing evidence, that the defense was unavoidably prevented from discovering the evidence of these three witnesses. The trial judge, who presided over the 2009 trial of both appellants, noted that the crimes arose from a spontaneous knife fight between patrons of the restaurant, and that there were "[m]any people" in the vicinity of the restaurant that evening; thus, the police officers arriving at the scene "faced a challenging investigation, at night and in the rain, with a large number of potential witnesses."

{¶ 19} With respect to the affidavits submitted by the new witnesses, the trial court noted that all three witnesses indicated in their affidavits that they recognized both Veliev and Ambartsoumov before the stabbings; however, "[n]one of the three witness affidavits explain when these witnesses first came forward, or to whom," and thus "[w]e are left to guess how, when and why they lost their professed fear of reprisal." The court further noted that, while the affidavit of Ambartsoumov indicates he learned of the "professed change of heart" of these witnesses in 2011, "[n]one of the witnesses explain if they contacted him in 2011, or set out any other facts about how they came forward," nor do these witnesses "say, one way or the other, whether they were interviewed by the original trial lawyers (or their investigators) before trial in 2009."

{¶ 20} In denying appellants' amended motion for leave to file a delayed motion for new trial, the trial court held in relevant part:

> Clear and convincing evidence has not been presented that the defense was unavoidably prevented from discovering the evidence of these three witnesses. No one disputes that these three were present at the scene of the crimes. Apparently, no one disputes that they were known to the defense and even

> listed among a number of potential witnesses on the state's witness disclosure. Yet, the affidavits provided by defense counsel[] do not refer to their contact, or lack of contact with these people. Trial counsel vigorously defended this case. They are in the best position to supply evidence that they did not know of the witnesses if that were true. They are in the best position to say now whether they, or an investigator working for them, met with each of the three witnesses before trial. They could tell us whether the witnesses told them a different story, or simply refused affirmative requests to meet for an interview. There is no such information provided. No suggestion comes from either attorney Palmer or attorney Shamansky that any of the three of them hid, or placed themselves beyond the range of a reasonable investigation by the defense, much less beyond the Subpoena power. That being true, no clear and convincing evidence has been presented that the defense was "unavoidably prevented" from using the three witnesses back in 2009.
>
> It merits mention that unlike most single-defendant cases this trial had two co-defendants with privately retained counsel. Both mounted a spirited, coordinated defense. In most respects their efforts appeared closely aligned, and both defendants potentially would have profited if the evidence tendered now had been heard. In such a situation, there is even more reason to expect something more than has been obliquely suggested here in the lawyers' affidavits. The court is entitled to learn more about their joint investigation of witnesses together with their joint trial preparation and strategy when faced with a motion like this one. The court is asked to accept that they missed three potentially helpful witnesses which, given the court's familiarity with the work of defense counsel on these two cases, simply seems implausible. Both defendants were similarly motivated to leave no good lead unexplored. As the court recalls, both men remained out on bond through trial and might themselves have assisted counsel. So, simply alleging years later – without true backup evidence submitted under oath – that defense counsel utterly failed to follow up with these alleged eye witnesses is not readily to be accepted. The "clear and convincing" standard demands more.

(Footnote omitted.)

{¶ 21} Upon review, we agree with the trial court that appellants have not shown, by clear and convincing evidence, that they were unavoidably prevented from discovering,

within the 120-day time limit, the evidence they are relying upon to support their motions. With respect to the three new witnesses, the state argued before the trial court that these witnesses were on the state's witness list and known to the defense at the time of trial and that most of the witnesses were interviewed by police.

{¶ 22} In *State v. Wilson*, 10th Dist. No. 93AP-732 (Nov. 2, 1993), this court affirmed the trial court's dismissal of a defendant's motion for new trial in a case in which the defendant and several potential witnesses knew each other prior to trial. As to one of the witnesses, this court noted that the record contained no evidence of how this individual's potential as a witness, "however minimal, was ultimately discovered." As to a second witness, this court noted that the statement of this witness was "truly newly discovered evidence," and could not have been discovered within 120 days of the trial, but the record failed to indicate "whether or not anyone attempted to interview" him prior to trial. In holding that the defense failed to present clear and convincing proof that defendant was unavoidably prevented from discovering the evidence at issue, this court observed that "[i]f counsel, for whatever reason, cannot effectively communicate with the potential witnesses or cannot devote sufficient time to investigate personally, then the services of a private investigator can be retained." Other Ohio courts have similarly held that a defendant was not "unavoidably prevented from discovering the evidence" where the witnesses were known to the defense prior to trial. *See, e.g., State v. Saban,* 8th Dist. No. 73647 (Mar. 18, 1999); *State v. Nicholson*, 8th Dist. No. 70916 (May 1, 1997).

{¶ 23} Federal case law establishes that "if a defendant is aware of the evidence at the time of trial, then it is not newly discovered evidence under Rule 33." *United States v. Sims,* 72 Fed.Appx. 249, 252 (6th Cir.2003). Further, "where a witness who has indicated to the defendant * * * an unwillingness to testify truthfully at trial * * * but later supplies an affidavit exonerating the defendant of the offense, the affidavit is merely newly *available* evidence, but it is not newly *discovered* evidence." (Emphasis sic.) *Id*. Thus, "a post-trial affidavit exonerating the defendant that was provided by a witness who could have been called at trial, but was not, can never be considered newly discovered evidence under Rule 33." *Id*., citing *United States v. Turns*, 198 F.3d 584 (6th Cir.2000).

{¶ 24} In the present case, the affidavits of all three witnesses indicate they knew both Ambartsoumov and Veliev at the time of the incident. According to the affidavit of Irina Stevens, she was seated at the same table with appellants on the night of the events

at issue. The trial court noted no apparent dispute that these individuals were "known to the defense and even listed among a number of potential witnesses on the state's witness disclosure." The affidavit of one of the witnesses, Artur Melkumov, indicates he spoke with police during the investigation on the night of the incident. Further, it is clear from the trial testimony that Irina Stevens was known at the time of trial. Specifically, one of the trial witnesses, Dimitri Zubrick, testified that his girlfriend, Irina Stevens, went to the restaurant with him. According to Zubrick's testimony, his girlfriend Stevens "was never outside." (Tr. 153.) Zubrick also noted at trial that he spoke with a defense investigator prior to trial.

{¶ 25} Ohio courts have held that affidavits filed outside of the 120-day time limit of Crim.R. 33 that fail to offer a sufficient explanation as to why evidence could not have been obtained sooner are inadequate to show that the movant was unavoidably prevented from obtaining the evidence within the prescribed time. *Shakoor* at ¶ 21. *See also State v. Golden*, 10th Dist. No. 09AP-1004, 2010-Ohio-4438, ¶ 19 (where appellant failed to explain the investigative actions taken or why he was unavoidably prevented from discovering potential witnesses, trial court did not abuse its discretion in determining appellant failed to demonstrate by clear and convincing proof that he was unavoidably prevented from discovering the witness or her statement within the time limitation of Crim.R. 33(B)); *State v. Dawson*, 9th Dist. No. 19179 (July 14, 1999) (noting, in case affirming trial court's denial of leave to file motion for new trial, that affidavits submitted failed to give specific timeline of defendant's attempts to gain exculpatory testimony or provide any reason why defendant could not have discovered the evidence before the 120-day period had elapsed); *State v. Wilson*, 7th Dist. No. 11 MA 92, 2012-Ohio-1505, ¶ 57 ("the affidavits and the motion for leave do not contain enough information to conclude that Wilson was unavoidably prevented from discovering the evidence within the prescribed period").

{¶ 26} In *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, the appellant, who was convicted of attempted murder in 2002, filed a motion for leave to file a delayed motion for new trial, stating that in 2007 he discovered for the first time that two individuals had witnessed the shooting; appellant's motion included the affidavits of these two individuals. The trial court denied the motion for leave, finding that the

appellant failed to demonstrate why he could not have learned of these witnesses' knowledge of the crimes with reasonable diligence.

{¶ 27} On appeal, this court affirmed, finding that appellant failed to "describe the investigative actions undertaken and why he was unavoidably prevented from discovering the testimony of these two alleged witnesses." *Id*. at ¶ 13. Specifically, there was no explanation as to why one of the witnesses was prompted to contact appellant; as to the other witness, who was known to appellant at the time of trial, appellant did not "indicate that either he or his trial counsel ever interviewed [the witness] or took steps to ascertain his knowledge of the events in question." *Id*. This court observed that appellant was "represented by counsel" but failed to indicate "why neither he nor his trial counsel were prevented from investigating the matter and discovering these two men witnessed the incident." *Id*. at ¶ 10.

{¶ 28} In the present case, as noted by the trial court, "[t]he exact date on which these witnesses first came forward, and to whom, is not shown anywhere in the record." Rather, both appellants state in their affidavits that they first heard of this information "when my present attorney told me about it in 2011." None of the witnesses indicated whether they were interviewed by defense counsel or investigators prior to the 2009 trial. However, as observed by the trial court, the affidavits of appellants' trial counsel do not state that counsel was unaware of the witnesses or that they had not investigated or interviewed these witnesses. Rather, the affidavits of trial counsel merely indicate that the witnesses had made statements not previously given to counsel.

{¶ 29} Further, while the witnesses averred in their affidavits that they feared retaliation, there is no explanation, as noted by the trial court, as to "when and why they lost their professed fear of reprisal"; nor do the materials submitted indicate whether these witnesses were interviewed and/or asked to testify or whether they would have refused to tell the truth had they been subpoenaed to testify. We also note that the affidavit of Stevens, indicating she was outside the restaurant during the incident, contradicts the trial testimony of Zubrick, who testified that Stevens was inside the restaurant during the events. Under Ohio law, "[e]vidence that merely contradicts the evidence presented at trial is not enough to constitute a new trial on the basis of 'newly discovered' evidence." *State v. Muntaser,* 8th Dist. No. 84951, 2005-Ohio-1309, ¶ 10, citing *Petro* at syllabus.

{¶ 30} Appellants in this case bore the burden of establishing, by clear and convincing evidence, that they were unavoidably prevented from discovering these witnesses earlier. *Nicholson*. We agree with the trial court that appellants have not shown, through the affidavits submitted, that the new witnesses were unknown or "placed beyond the range of a reasonable investigation by the defense, much less beyond the Subpoena power." Upon review, appellants failed to prove by clear and convincing evidence that they were unavoidably prevented from discovering, within the prescribed time period, the evidence they are relying on to support their motions. Accordingly, the trial court did not abuse its discretion in denying appellants' amended motions for leave to file a delayed motion for new trial.

{¶ 31} We further find that the trial court did not abuse its discretion in denying the motions without a hearing because "the evidence, on its face, did not support [appellants' claims that they were] unavoidably prevented from timely discovery of the evidence." *State v. Davis*, 9th Dist. No. 12CA010256, 2013-Ohio-846, ¶ 12, citing *Cleveland* at ¶ 54.

{¶ 32} Based upon the foregoing, appellants' first and second assignments of error are without merit and are overruled, and the judgments of the Franklin County Court of Common Pleas, denying appellants' amended motions for leave to file a delayed motion for new trial, are hereby affirmed.

Judgments affirmed.

BROWN, J., KLATT, P.J., and SADLER, J., concur.

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