

[Cite as *State v. Bates*, 2009-Ohio-6422.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-583
 : (C.P.C. No. 02CR-08-5136)
 Robert L. Bates, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Robert L. Bates, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Robert L. Bates, from a judgment of the Franklin Court of Common Pleas, denying appellant's motion for leave to file a delayed motion for new trial.

{¶2} On August 28, 2002, appellant was indicted on one count of aggravated murder with two firearm specifications. On June 23, 2003, a jury found appellant guilty of the lesser-included offense of murder with firearm specifications. The trial court sentenced appellant to consecutive sentences of 15 years to life on the murder count, five

years for discharging a firearm while inside a vehicle, and three years for displaying, brandishing, indicating possession of, or using a firearm in the commission of an offense. Appellant appealed his sentence, arguing that the trial court should have merged the firearm specifications. In *State v. Bates*, 10th Dist. No. 03AP-893, 2004-Ohio-4224, this court affirmed the trial court's imposition of consecutive sentences.

{¶3} On February 1, 2005, appellant filed a motion for leave to file a motion for new trial, asserting newly discovered evidence. Specifically, appellant argued that, in October of 2004, his son, Troy Bates, had inspected the van in which appellant was seated at the time of the incident, and that his son found a bullet hole on the inside of the vehicle. Appellant argued that this evidence supported his claim that Tiara Thomas, who testified at trial that she observed the shooting incident from inside her townhouse, was actually sitting in the passenger seat of the van, next to appellant, at the time the weapon discharged, killing Moussa Thiam. On February 3, 2005, appellant filed a motion for new trial. By decision and entry filed November 8, 2005, the trial court denied the motion.

{¶4} On July 23, 2007, appellant filed a petition for post-conviction relief, asserting that his trial counsel was ineffective in failing to introduce at trial pictures of appellant's van taken by Troy on January 31, 2003. Appellant argued that the pictures depicted a bullet hole at the brim of the driver's seat. Appellant argued, as he did in his 2005 motion, that the bullet hole proved that his girlfriend, Thomas, was sitting beside him in the van at the time the gun discharged. Appellant, while acknowledging that the van had been parked in the backyard of his residence since the time of the shooting, claimed that he was unavoidably prevented from discovering this evidence due to his incarceration. Appellant also filed, on July 23, 2007, a motion for new trial, pursuant to

Crim.R. 33(A)(4), asserting that the evidence was insufficient to sustain his conviction for murder.

{¶5} On August 2, 2007, the state filed a memorandum contra appellant's motion for new trial. In the accompanying memorandum, the state argued that the motion was untimely, and that it was barred by *res judicata*. Also on that date, the state filed a motion to dismiss appellant's petition for post-conviction relief. By decision and entry filed on August 9, 2007, the trial court denied appellant's motion for new trial and his petition for post-conviction relief. Appellant appealed the trial court's decision, and this court affirmed that decision in *State v. Bates*, 10th Dist. No. 07AP-753, 2008-Ohio-1422.

{¶6} On April 27, 2009, appellant filed a motion for leave to file a delayed motion for new trial, alleging newly discovered evidence. Specifically, appellant claimed that Thomas admitted to being in the van with appellant on the date of the incident. In support, appellant attached a letter purportedly written by Thomas, in which she stated in part: "I feel that I am as much of the blame as you are of Moussa's death." Appellant also submitted the affidavit of his son, Troy, in which Troy averred that he had spoken with Thomas in February 2009 regarding the letter and the incident. In the affidavit, Troy stated that he asked Thomas why she did not tell the truth about being in the van when the victim was shot, and that Thomas indicated she was afraid of being charged as an accomplice if she "told the actual account of what happened."

{¶7} In the accompanying memorandum in support, appellant claimed he "has known all along that Thomas was in his van when Mr. Thiam was shot and killed," but that "[w]hat makes this evidence newly discovered is that Defendant had no way humanly possible of knowing that Tiara would ever confess the truth." By decision and entry filed

May 21, 2009, the trial court denied appellant's motion for leave to file a delayed motion for a new trial.

{¶8} Appellant's pro se brief fails to comply with the requirements of App.R. 16(A)(3), as it does not set forth a statement of assignments of error. Instead, the body of the appellate brief contains three "error[s]," which we will construe as the following assignments of error:

ERROR [1] The trial court error when denying appellant Motion For Leave to File a delayed Motion for New Trial when Newly Discovered evidence is material to the issue.

ERROR [2] The court error when appellant was not given the opportunity to demonstrate this strong probability would change the result if a new trial is Granted.

ERROR [3] The evidence has been discovered since trial the new evidence material to the defense which the defendant could not with reasonable diligence have discovered and produced at trial appellant could not reasonably brought this new evidence within 120 day standard in criminal rule 33 appellant trial, 2003, the new evidence is provided in the year 2004.

(Sic passim.)

{¶9} Appellant's "errors" are interrelated and will be addressed jointly. Appellant's primary contention is that the trial court erred in denying, as untimely, his motion for leave to file a delayed motion for new trial. Appellant maintains that he made a showing of newly discovered evidence that was material to his case, and that such evidence would change the result if a new trial were to be granted.

{¶10} Motions for new trial are governed by Crim.R. 33. The decision by a trial court whether to grant leave to file an untimely motion for new trial is subject to review for abuse of discretion. *State v. West*, 10th Dist. No. 09AP-474, 2009-Ohio-5203, ¶9.

Pursuant to Crim.R. 33(A)(6), a new trial may be granted when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶11} Crim.R. 33(B) states in relevant part as follows:

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} In *State v. Petro* (1947), 148 Ohio St. 505, syllabus, the Supreme Court of Ohio held:

To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown 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.

{¶13} In the present case, the verdict in appellant's case was rendered in 2003, and appellant's motion for leave to file a delayed motion for new trial was filed in 2009; thus, appellant was required to present clear and convincing evidence of unavoidable delay. Crim.R. 33(B).

{¶14} As noted above, in support of the motion, appellant relied upon a letter from Thomas and an affidavit submitted by Troy. Appellant views as significant Thomas'

statement in the 2004 letter: "I feel that I am as much of the blame as you are." We note, however, that the statement alone is not necessarily self-inculpatory as to the crime, and Thomas further states in the letter: "I never wanted you to see me as betraying you the day I testified against you," and that "if Moussa [the victim] would [have] done that to you I would [have] testified against him on your behalf."

{¶15} Appellant argues that Troy's affidavit adds meaning to Thomas' statement in the letter regarding "blame" for the incident. As noted, Troy averred in the affidavit that he asked Thomas why she did not tell the truth about being in the van, and her response was that she feared being charged as an accomplice "if she had told the actual account of what happened."

{¶16} In response, the state argues that the affidavit of Troy, describing what Thomas allegedly told him, relies upon hearsay. The state further argues that the affidavit is vague, as Troy never specifically stated what Thomas' "account" would have been. The state contends that, at most, Troy's affidavit places Thomas in the van, but does not constitute an admission by Thomas of culpability in the shooting.

{¶17} The Supreme Court has held that, where in a motion for new trial a movant seeks to introduce hearsay evidence which purports to be within the declaration-against-penal-interest exception to the hearsay rule, the movant must first establish that the declarant is unavailable. *State v. Williams* (1975), 43 Ohio St.2d 88, 92. Further, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *State v. Wilson* (June 27, 1978), 10th Dist. No. 77AP-678, quoting Rule 804(b)(4) of the Federal Rules of Evidence.

{¶18} In the instant case, even assuming Thomas' statement to be against her penal interest and exculpatory as to appellant, we note that Thomas actually testified at trial, and appellant would have to establish the unavailability of Thomas as a witness, as well as provide sufficient corroborating circumstances indicating the trustworthiness of the statements. Appellant, however, did not submit an affidavit by Thomas, nor did appellant allege that she was unavailable. See *State v. Beckett* (Apr. 15, 1987), 9th Dist. No. 12910 (trial court did not abuse its discretion in denying motion for new trial on grounds of newly discovered evidence where movant failed to establish unavailability of declarant whose statement purports to be within the declaration-against-penal-interest exception to the hearsay rule).

{¶19} Further, we conclude the trial court did not err in finding that appellant failed to show, by clear and convincing evidence, that he was unavoidably prevented from discovering this purported newly discovered evidence within 120 days after the conclusion of his trial. In general, "[a] party is 'unavoidably prevented' from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *State v. Woodward*, 10th Dist. No. 08AP-1015, 2009-Ohio-4213, ¶13.

{¶20} In his motion, appellant claimed he has "known all along that Tiara Thomas was in his van." As noted by the state, appellant's previous post-trial motions were all premised upon a claim that Thomas was in the passenger seat of his van at the time of the shooting, and we have previously noted that Thomas testified at trial. See *State v. Spangler*, 5th Dist. No. 02 CA 56, 2003-Ohio-2895, ¶21 (appellant failed to demonstrate,

by clear and convincing evidence, that he was unavoidably prevented from discovering evidence where witness testified at trial and could have been questioned concerning alleged conversation implicating that witness). Moreover, the letter from Thomas is dated 2004, and appellant offered no explanation as to why no effort was made for at least five years to ascertain what Thomas meant by the statement at issue (i.e., "I feel that I am as much of the blame as you are").

{¶21} The trial court also found, and we agree, that appellant failed to show that this purported new evidence "created a strong probability of a different result if a new trial was granted." *State v. Starling*, 10th Dist. No. 01AP-1344, 2002-Ohio-3683, ¶13. Again, and apart from the hearsay concerns previously discussed, it is unclear what the "account" of Thomas would be, let alone that it would be exculpatory as to appellant, and despite appellant's characterization and suggested import of Thomas' statement, nothing in her letter suggests she would change her prior testimony that appellant shot the victim. Further, even accepting that the statement in the letter involves a partial recanting of Thomas' testimony, the state's case did not rest solely upon her testimony. At trial, in addition to the testimony of Thomas, the state presented the testimony of Trent Seal, who stated that appellant was seated in a van and the victim was standing outside the van at the time of the incident. According to Seal, appellant and the victim were arguing, and Seal observed appellant pull out a gun, point the weapon out the driver's window, and fire "[a]t least five" shots. (Tr. 107.) Seal further testified that Tiara Thomas was inside the residence during the shooting. Another witness, Tyrone Thomas, similarly testified that Tiara Thomas was inside her residence at the time the shots were fired.

{¶22} Upon review, we find no abuse of discretion by the trial court in denying appellant's motion for leave to file a delayed motion for new trial. Based upon the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and CONNOR, J., concur.
