

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-843
v.	:	(C.P.C. No. 90CR-01-414)
	:	
Mekuria Neguse,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Mekuria Neguse, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Mekuria Neguse ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas denying his motion seeking a new trial pursuant to Crim.R. 33. For the reasons that follow, we affirm.

{¶2} On July 11, 1990, appellant was convicted on charges of murder with a gun specification and having a weapon while under a disability with specifications for prior

drug abuse and assault convictions. The trial court imposed a sentence of 15 years to life plus an additional three years for the gun specification. We affirmed appellant's convictions. *State v. Neguse* (1991), 71 Ohio App.3d 596. Appellant has filed a number of post-conviction pleadings seeking to overturn his convictions, each of which has been unsuccessful.¹

{¶3} On July 28, 2009, appellant filed a motion seeking a new trial pursuant to Crim.R. 33. Appellant argued that he was entitled to a new trial based on newly discovered evidence that he claimed he was unavoidably prevented from discovering within the time period required for the filing of a Crim.R. 33 motion. The evidence appellant argued constituted newly discovered evidence was: (1) alleged inconsistencies between the testimony of trial witnesses Terrence Meadows and police officer Diane Barrow-Hollis, and (2) the failure of trial witnesses Meadows and Ricky Lee Fitzgerald to disclose their criminal records during their trial testimony.

{¶4} The trial court denied appellant's motion without holding a hearing, finding that the evidence cited by appellant was not newly discovered evidence that could not have been discovered earlier through the exercise of reasonable diligence by appellant. Appellant filed this appeal, asserting two assignments of error:

Assignment of Error No. 1

It was plain error and abuse of discretion for the court failed to address the issue raised by the defendant of prosecutorial misconduct, where the prosecutor put on what he knew was perjured testimony by witnesses Terrence Meadows and Rick [sic] Lee Fitzgerald, claiming no past criminal record other

¹ For a summary of these post-conviction pleadings, see *State ex rel. Neguse v. McIntosh*, 115 Ohio St.3d 216, 2007-Ohio-4788.

than the charge witnesses were being held upon date of trial in 1990 under oath.

Assignment of Error No. 2

It was plain error and an abuse of discretion, for the court failed to address the record as a whole before denying defendant's motion for a new trial, as evidence [sic] by 2009 order denying 2009 defendant's Crim.R. 33 motion.

{¶5} Appellant's assignments of error are interrelated, and will therefore be addressed together. Crim.R. 33 provides, in relevant part:

(A) Grounds.

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

* * *

(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial.

(B) Motion for new trial; form, time.

* * *

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.

{¶6} Crim.R. 33 contemplates a two-step procedure when a defendant seeks to file a motion for new trial more than 120 days after the conclusion of the trial. In the first

step, the defendant must demonstrate that he was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial. A defendant is "unavoidably prevented" from discovering the new evidence within the time period for filing a motion for new trial when that defendant had no knowledge of the evidence supporting the motion for new trial, and could not have learned of the existence of the evidence within the time prescribed for filing such a motion through the exercise of reasonable diligence. *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244. In the second step, if the defendant does establish by clear and convincing evidence that the delay in finding the new evidence was unavoidable, the defendant must file the motion for new trial within seven days from that finding. *State v. Woodward*, 10th Dist. No. 08AP-1015, 2009-Ohio-4213.

{¶7} A trial court's decision whether to grant leave to file an untimely motion for new trial is subject to review for abuse of discretion. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518. Abuse of discretion means more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶8} In the second step, if the defendant does establish by clear and convincing evidence that the delay in finding the new evidence was unavoidable, the defendant must file the motion for new trial within seven days from that finding. *Woodward*. Once the defendant has been allowed to file a motion for new trial, the decision whether to actually grant the new trial is left to the sound discretion of the trial court, and will not be reversed absent an abuse of that discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71. In order to obtain a new trial based on newly discovered evidence, a defendant must show that

the new evidence: (1) discloses a strong probability that the result of the trial would be changed if a new trial is granted; (2) has been discovered since the trial; (3) is such as could not have been discovered before the trial through the exercise of due diligence; (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. *Berry*, citing *State v. Petro* (1947), 148 Ohio St. 505.

{¶9} It is not clear from the motion appellant filed with the trial court whether appellant's motion sought leave to file a motion for new trial in accordance with the two-step procedure, or whether the motion went directly to the second step by seeking a new trial. It appears that the trial court addressed itself both to the question of whether appellant should be granted leave to file a motion for new trial and to the merits of the motion for new trial. The trial court denied appellant's motion for new trial by concluding that the alleged inconsistencies in the evidence offered at trial were evidence of a type that could not have been discovered "sooner," and by further concluding that the evidence would not have been material.²

{¶10} Regardless of the precise nature of the motion, the evidence offered by appellant in support of his motion supports neither the claim that appellant should have been granted leave to file an untimely motion, nor the claim that appellant should have been granted a new trial. The first piece of evidence offered by appellant in support of his

² This conclusion illustrates the uncertainty of the trial court's approach to the motion. The standard for consideration of a motion for leave to file a motion for new trial involves whether the new evidence could have been discovered during the 120-day period for filing a timely motion for new trial, while the standard for consideration of a motion for new trial involves whether the newly discovered evidence could have been discovered prior to trial. In addition, the question of whether the new evidence is material is relevant to the consideration of the merits of the motion for a new trial.

motion for new trial was alleged inconsistencies between testimony of two of the witnesses at trial. As support for a claim that appellant should have been granted leave to file a motion for new trial, there is nothing indicating that appellant could not have discovered these inconsistencies during the 120-day period for filing a timely motion for new trial. The mere assertion by appellant that he was unavoidably delayed from discovering the evidence upon which he relies is not sufficient to carry appellant's burden of proof on that issue. *State v. Bush*, 10th Dist. No. 08AP-627, 2009-Ohio-441.

{¶11} Nor would alleged inconsistencies in trial testimony support a claim that appellant is entitled to a new trial. By definition, this is not the type of "newly discovered" evidence that would support a motion for new trial, since these inconsistencies should have been apparent during the trial itself, and appellant would have had the opportunity to argue those inconsistencies before the jury.

{¶12} The second piece of evidence offered by appellant in support of his motion for new trial was the denial of the existence of any criminal convictions by witnesses Meadows and Fitzgerald when asked about their criminal records at trial. Nothing in the materials offered by appellant in support of his motion offer any basis to conclude that appellant was unavoidably prevented from discovering this evidence during the 120-day period for filing a timely motion for new trial.

{¶13} As for the issue of whether the evidence regarding the criminal records of the two witnesses would support a claim that a new trial should be granted, while we cannot say, as the trial court did, that this evidence could not have been material, given the possibility that their criminal records may have given the jury reason to question their credibility, this evidence nevertheless still does not support appellant's claim that a new

trial is required. First, nothing in the materials offered in support of his motion for new trial establishes that appellant could not have discovered the criminal records of the two witnesses prior to trial. Second, that evidence would have served to merely impeach or contradict the evidence offered by the two witnesses at trial.

{¶14} Although not asserted as a separate assignment of error, appellant also argues that the trial court erred when it denied his motion without holding an evidentiary hearing. If the defendant provides documents that on their face support the defendant's claim that discovery of the evidence was unavoidably delayed, the trial court must hold a hearing to determine whether there is clear and convincing evidence of unavoidable delay. *State v. Wright* (1990), 67 Ohio App.3d 827; *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181. However, where the documents do not show on their face that the defendant was unavoidably delayed from discovering the evidence during the 120-day period for filing a timely motion for new trial, a trial court does not abuse its discretion when it denies a defendant's motion without holding a hearing. *Bush*.

{¶15} We cannot say the trial court abused its discretion when it denied appellant's motion. Therefore, appellant's two assignments of error are overruled. Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and McGRATH, J., concur.
