[Cite as *State v. Bethel*, 2010-Ohio-3837.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-924 (C.P.C. No. 00CR-11-6600)
Robert W. Bethel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 17, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Timothy Young, Ohio Public Defender, and *Rachel Troutman*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Robert W. Bethel ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas denying his motion for leave to file a delayed motion for new trial and motion for new trial.

{¶2} In August 2003, appellant was convicted of two counts of aggravated murder with three specifications[1] and sentenced to the death penalty in accordance with a jury's recommendation of the same. The convictions arose out of the 1996 shooting deaths of James Reynolds ("Reynolds"), and his girlfriend Shannon Hawks ("Hawks").

[1] Each count contained two death penalty specifications and a firearms specification.

The Supreme Court of Ohio has upheld the convictions and death sentence on direct appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853. The following factual summary is taken from that decision.[2]

{¶3} Appellant, Jeremy Chavis ("Chavis"), Tyrone Green ("Green"), and Donald Langbein ("Langbein"), were members of the Crips gang. In 1995, Green killed Rodney Cain ("Cain") during a burglary. Though Reynolds and another man, Donald Pryor ("Pryor"), were also involved in the incident, Reynolds was allegedly the only eyewitness to the homicide. As a result of Cain's murder, Green was indicted for aggravated murder with death specifications. As part of the Green investigation, a search warrant was issued. The affidavit in support of the search warrant stated that Reynolds told Pryor that Green shot Cain. Discovery materials, including the search warrant and supporting affidavit, were sent to Green's attorney about four weeks prior to the murder of Reynolds and Hawks. On June 26, 1996, the bodies of Reynolds and Hawks were discovered in a field owned by Chavis's grandfather. Reynolds had been shot ten times and Hawks had been shot four times. After the murder of Reynolds, the only known eyewitness to Cain's shooting death, Green entered a plea to a reduced charge of manslaughter.

{¶4} In 2000, Langbein was charged with an unrelated federal firearms violation and told agents of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), what he knew about the Reynolds-Hawks murders. According to Langbein, appellant and Chavis lured Reynolds and Hawks into a field owned by Chavis's grandfather, whereupon appellant and Chavis shot and killed the couple. The reason for the murders was concern that

[2] We will set forth the facts most relevant to the issue before us. However, the details surrounding appellant's arrest and conviction are set forth in the Supreme Court of Ohio's decision.

Reynolds would testify against Green. Appellant was arrested on November 6, 2000, and indicted on two counts of aggravated murder each with death specifications. Counsel were appointed and a plea agreement was reached. As part of the plea agreement, appellant made an "off-the-record" proffer of his testimony against Chavis.

{¶5} According to the proffer, killing Reynolds had been Chavis's idea, and before the murders, appellant and Chavis discussed what they were going to do. Appellant stated he and Chavis drove Reynolds and Hawks to a field belonging to Chavis's grandfather to do some shooting. After walking to a clearing, appellant, using a 9mm handgun, and Chavis, using a shotgun, fired at Reynolds and Hawks who were standing together; Reynolds with his arm around Hawks. Specifically, appellant stated that after the couple fell to the ground, he wanted to leave, but Chavis handed appellant another loaded clip and indicated he wanted to make sure the couple was dead. Appellant explained that he then emptied the other clip into the bodies at close range. After the shooting, appellant drove to an alley where he threw his shirt into a dumpster, and then the pair drove to a body of water where Chavis separated the barrel from the shotgun and disposed of it in the body of water. Appellant described that he and Chavis proceeded to Chavis's house where they changed clothes and threw their clothes in a dumpster.

{¶6} On August 30, 2001, after making the proffer, appellant pled guilty to two counts of aggravated murder, and the state agreed to dismiss the death specifications. Though agreeing to testify truthfully against Chavis as part of the plea agreement, on November 13, 2001, appellant refused to do so. Therefore, on December 18, 2001, the

state moved to have appellant's plea agreement declared void. The motion was granted, the original charges were reinstated, and appellant was assigned new counsel.

{¶7} Appellant moved to suppress his previously made proffer, and the trial court denied said motion.[3] At trial, appellant denied his guilt and testified that he lied in his proffer to obtain the benefit of a plea bargain. Langbein also testified at appellant's trial. According to Langbein, he and appellant were concerned about witnesses who would testify against Green. Langbein explained that appellant, Chavis, Reynolds, and Hawks went to do some shooting in a field owned by Chavis's grandfather, whereupon appellant shot Reynolds and Hawks.

{¶8} Also testifying at trial was Theresa Cobb Campbell ("Campbell"), appellant's girlfriend at the time of the murders. According to Campbell, after the murders, she and appellant had a conversation at her mother's house in which appellant told her he killed Reynolds and Hawks. Specifically, Campbell testified:

> He said that [he], Jeremy, and these two people went to go practice shooting guns. And he said when they got there, he said that he had a feeling to shoot, and he said, "So I did."
>
> And he said that he called Jeremy to come and look to see what he had done, and he said that Jeremy went, and he started crying.
>
> And then he said that he reloaded and – the clip and fired.

(Tr. Vol. XI 150.)

{¶9} Despite appellant's denial of involvement, the jury found appellant guilty of all charges and specifications and recommended death sentences for both killings. The

[3] The use of appellant's proffer was upheld by the Supreme Court of Ohio. See *Bethel*, supra.

trial court accepted the jury's recommendation and sentenced appellant to death. As indicated previously, the Supreme Court of Ohio has upheld appellant's convictions and death sentence on direct appeal. Thereafter, appellant requested post-conviction relief. However, the trial court denied appellant's post-conviction relief request, and this court affirmed that decision on January 5, 2008. See *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, discretionary appeal not allowed, 122 Ohio St.3d 1502, 2009-Ohio-4233.

{¶10} On April 13, 2009, following a public records request[4] in 2008, appellant filed the instant motions seeking a new trial based on newly discovered evidence. The basis for the motions was a document in the public records that had been in the possession of the Columbus police. The document was a report by Agent Daniel F. Ozbolt from the ATF. In the report entitled "CHAVIS, Jeremy," Agent Ozbolt indicates he was contacted by Shannon Williams ("Williams"), an inmate at the Franklin County Jail. According to the report, Williams stated fellow inmate Langbein told Williams that "he was involved in a homicide with an individual who is now incarcerated at the Federal Penn., Ashland, KY, where the victim was shot seventeen times" and that "the other individual who was arrested was the driver following the homicide." Williams stated he knew of no other details, but would "keep his ears open for further information." Because Chavis was incarcerated in the federal prison in Kentucky at this time, appellant contends this statement amounts to a "confession" that Langbein, not appellant, was the person who committed the murders with Chavis.

[4] The public records request was filed by a private investigator hired by appellant's mother.

{¶11} On September 3, 2009, the trial court denied both of appellant's motions. This appeal followed, and appellant brings the following two assignments of error for our review:

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL AND FOR FAILING TO HOLD A HEARING.
>
> [2.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

{¶12} 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:
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> * * *
>
> (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.
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> * * *
>
> **(B) Motion for new trial; form, time.**
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> * * *
>
> 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.

{¶13} 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.

{¶14} 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.

{¶15} 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.

{¶16} In his first assignment of error, appellant contends the trial court erred in denying his motion for leave to file a motion for a new trial. However, as we have already stated, the trial court addressed not only the motion for leave to file a motion for new trial, but also the merits of the motion for new trial based on newly discovered evidence. Because, as will be explained infra, we affirm the trial court's judgment in this respect, appellant's first assignment of error is moot. See *State v. Brown*, 7th Dist. No. 10 MA 17, 2010-Ohio-405.

{¶17} In his second assignment of error, appellant contends the trial court erred in denying his motion for new trial based on evidence material to his defense that was in the possession of the state prior to trial but not submitted to him until the fulfillment of the public records request. In *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, the United States Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶18} Evidence suppressed by the prosecution is "material" within the meaning of *Brady* only if there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. *Kyles v. Whitley* (1995), 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1566; see also *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375. As the United States Supreme Court has stressed, "the adjective ['reasonable'] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1555; see also *Strickler v. Greene* (1999), 527 U.S. 263, 289-90, 119 S.Ct. 1936, 1952.

{¶19} Initially, we note it is not clear that the ATF report was "suppressed" by either the prosecution or the Columbus police. As noted by the trial court, there is no indication as to when this report, titled "CHAVIS, Jeremy" and making no reference whatsoever to appellant, came into the possession of the police department or when it was placed in connection with the file on appellant. However, assuming arguendo that the prosecution "suppressed" the report within the meaning of *Brady*, we find no reasonable probability of a different trial outcome had the defense received this report. Thus, we find no *Brady* violation and further find that appellant failed to meet the standard for a new trial.

{¶20} Though appellant's attorneys who ultimately tried the case stated in their affidavits that they had not heard of Williams in the context of appellant until seeing the

ATF report, we note, as did the trial court, that Williams was named on the state's witness disclosure list. Thus, it is entirely possible that appellant's previous counsel, of which there were several, did investigate Williams and found him to be of no value to the defense.

{¶21} Additionally, it is wholly speculative as to whether Langbein's statements are referring to the homicides at issue here. Williams said Langbein stated he was involved in a homicide where the victim was shot 17 times. Here, there were two victims, one shot ten times, and the other shot four times. Also, Williams said Langbein stated the other person who was arrested was the driver after the homicide; however, according to appellant, Chavis was not a driver but an actual participant in the shootings. Appellant's version of events, that he used a 9mm while Chavis used a shotgun, correlates with the evidence presented at trial that the victims suffered wounds consistent with those caused by a 9mm and a shotgun. Additionally, multiple 9mm shell casings and 12-guage shotgun casings were recovered from the scene.

{¶22} Most importantly perhaps is that the evidence presented against appellant consisted of more than just his statements made to Langbein. The evidence also consisted of appellant's statements to Campbell and his own admission as contained in his proffer. Moreover, Langbein was extensively cross-examined at trial, wherein defense counsel tried to portray Langbein as one implicating appellant only to get a better deal on his federal firearms charge. Langbein was also questioned about having a grudge against appellant and being one of the persons involved in the planning of Reynolds' murder. Additionally, Langbein was questioned about a confrontation between Reynolds and another individual, Joey Green, in which Green threatened Reynolds causing

Reynolds to expose a gun to Green. Thus, Langbein's cross-examination inferred that others, or even he, was the person who committed the homicides.

{¶23} Lastly, we note the ATF report indicates that Langbein stated he was "involved" in a homicide. Assuming Langbein was referring to the Reynolds-Hawks murders, Langbein's statement still does not amount to a "confession" of murder as appellant claims. Langbein was involved in this matter as he had been working as an informant with authorities as early as July 2000. Langbein even wore a wire on several occasions in an attempt to obtain incriminating statements from appellant, and all of these meetings occurred prior to Williams contacting Agent Ozbolt on November 9, 2000.

{¶24} In short, nothing in the ATF report "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. at 1555. Finding no *Brady* violation and finding the "newly discovered evidence" forming the basis of appellant's motion fails to satisfy the standard for a new trial, we find no error in the trial court's decision denying appellant's motion for a new trial. Accordingly, appellant's second assignment of error is overruled.

{¶25} For the foregoing reasons, appellant's second assignment of error is overruled, appellant's first assignment of error is moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.

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