

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|----------------------|---|--------------------------|
| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | No. 09AP-1004 |
| v. | : | (C.P.C. No. 00CR07-4404) |
| | : | |
| Travis L. Golden, | : | (ACCELERATED CALENDAR) |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on September 21, 2010

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

Travis L. Golden, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Travis L. Golden ("appellant"), pro se, appeals from a judgment of the Franklin County Court of Common Pleas in which the court denied his motion for leave to file a delayed motion for new trial and dismissed his petition for postconviction relief. For the following reasons, we affirm.

{¶2} Pursuant to a jury trial, appellant was convicted of murder with firearm specification and improperly discharging a firearm into a habitation or school with firearm specification arising from the shooting death of Erskine James Hamber on June 29, 2000. In its February 26, 2001 judgment entry, the trial court sentenced appellant to a total of 21 years to life in prison. This court affirmed the judgment in *State v. Golden*, 10th Dist. No. 01AP-367, 2001-Ohio-8769. Subsequently, this court denied appellant's App.R. 26(B) application to reopen his appeal in *State v. Golden* (Dec. 10, 2002), 10th Dist. No. 01AP-367 (memorandum decision), and his motion for reconsideration of that denial in *State v. Golden* (Mar. 4, 2003), 10th Dist. No. 01AP-367 (memorandum decision).

{¶3} On July 6, 2009, appellant filed a motion for leave to file a motion for new trial, pursuant to Crim.R. 33(B), or, in the alternative, a petition for postconviction relief pursuant to R.C. 2953.21. In this filing, appellant claimed that newly discovered evidence and prosecutorial misconduct warranted a new trial. Specifically, appellant claimed that on August 10, 2000, a woman named Yvonne D. Jennings gave a statement to the police averring that she witnessed someone other than appellant murder Hamber. Appellant further claimed that the prosecuting attorney failed to disclose Jennings' statement to the defense prior to trial. Appellant also alleged that he was entitled to postconviction relief because the prosecution's failure to disclose Jennings' statement denied him a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Appellant attached to his motion/petition an unauthenticated copy of Jennings' statement to the police and two unauthenticated photographs of the crime scene.

{¶4} On October 13, 2009, the trial court denied appellant's motion for leave to file a motion for new trial, finding that appellant had not shown by clear and convincing proof that he was unavoidably prevented from discovering the "new" witness before the time limits of Crim.R. 33(B) had expired. The court also dismissed appellant's petition for postconviction relief, finding that it did not have jurisdiction to entertain the untimely petition.

{¶5} Appellant timely appeals, asserting the following assignment of error:

Misconduct by the prosecuting attorney; suppressed, withheld and/or failed to disclose exculpatory evidence, which was favorable material to the defendants defense; in violation of the defendants right to a fair trial, and due-process, guaranteed by the 14th Amendment of the United States Constitution.

(Sic passim.)

{¶6} Initially, we note that appellant's captioned assignment of error does not technically allege any error committed by the trial court. However, in our view, appellant's argument in the body of his brief asserts that the trial court abused its discretion in denying his motion for leave to file a delayed motion for new trial and in dismissing his petition for postconviction relief. We note that appellee, state of Ohio, has interpreted appellant's argument in like manner.

{¶7} Crim.R. 33(A) provides the grounds upon which a defendant may receive a new trial. As relevant here, Crim.R. 33(A)(2) and (6) provide, respectively, that a defendant may be granted a new trial upon "[m]isconduct of the * * * prosecuting attorney" or "[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."

{¶8} A motion for new trial based upon misconduct of the prosecuting attorney must be filed within 14 days after the day upon which the verdict was rendered. A motion for new trial based upon newly discovered evidence must be filed within 120 days after the day upon which the verdict was rendered. Appellant filed his motion for new trial more than eight years after the jury rendered its verdict. Because appellant did not raise his claims within the designated time limits set forth in Crim.R. 33(B), he was required to file a motion for leave to file an untimely or delayed motion for new trial. *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶19.

{¶9} To obtain leave to file a motion for new trial based upon prosecutorial misconduct, appellant must demonstrate "by clear and convincing proof" that he was "unavoidably prevented" from filing the motion within the 14-day time period. Crim.R. 33(B). To obtain leave to file a motion for new trial based on newly discovered evidence, appellant must demonstrate by "clear and convincing proof" that he was "unavoidably prevented" from discovering the evidence relied upon to support the motion within the 120-day time period. "[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* (1984), 19 Ohio App.3d 141, 145-46.

{¶10} "The standard of 'clear and convincing evidence' is defined as that measure or degree of proof that is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and that will produce in the mind of the trier of fact a firm belief or conviction as to the facts

sought to be established." *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶7, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. "Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Townsend* at ¶7, citing *Ford v. Osborne* (1887), 45 Ohio St. 1, paragraph two of the syllabus.

{¶11} A reviewing court will not disturb a trial court's decision granting or denying a Crim.R. 33 motion for leave to file a motion for new trial absent an abuse of discretion. *Townsend* at ¶8, citing *State v. Pinkerman* (1993), 88 Ohio App.3d 158, 160. An 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* (1983), 5 Ohio St.3d 217, 219.

{¶12} Appellant's motion for leave contains unverified allegations that the prosecuting attorney willfully withheld from him the statement Jennings gave to the police on August 10, 2000, and that he could not have known about such conduct in time to file a motion for new trial within 14 days of the verdict. Appellant provides no evidence corroborating these claims. Without evidentiary support, appellant fails to establish "by clear and convincing proof" that he was unavoidably prevented from filing a timely motion for new trial based upon prosecutorial misconduct.

{¶13} Furthermore, appellant fails to establish by "clear and convincing proof" that he was unavoidably prevented from discovering, within 120 days of the verdict, the existence of Jennings or her statement to the police. In this regard, this court's decision in *Townsend* is instructive. There, the defendant argued that he was unavoidably

prevented from discovering two witnesses who came forward after the trial and asserted that the defendant did not shoot the victim. This court rejected the defendant's argument, finding that the defense could have discovered the witnesses through its own investigation. Specifically, we stated that "appellant does not explain why he was unavoidably prevented from discovering that these two men allegedly witnessed the shooting in a timely manner. Appellant was represented by counsel, and appellant fails to indicate why neither he nor his trial counsel were prevented from investigating the matter and discovering these two men witnessed the incident." *Townsend* at ¶10.

{¶14} The *Townsend* court cited with approval an earlier case from this court, *State v. Wilson* (Nov. 2, 1993), 10th Dist. No. 93AP-732, which addressed, in the context of a motion for leave to file a motion for new trial, the alleged discovery of "newly discovered" potential witnesses. In *Wilson*, we held that the denial of leave to file a motion for new trial was proper because the record did not demonstrate how the defendant and his counsel were prevented from discovering the potential witnesses prior to trial or how the potential witnesses were ultimately discovered. We determined that it was necessary for the defense to conduct a thorough pretrial investigation and to make a "serious effort" to question potential witnesses, or at least retain a private investigator (with public funds, if the accused is indigent) to do so. *Id.*

{¶15} The rationale of *Townsend* and *Wilson* applies to the instant case. Appellant fails to explain why neither he nor his trial counsel could have timely discovered the statement Jennings made to the police, other than to say that the prosecution failed to disclose the statement. However, appellant's bald assertion in this regard is not enough. As noted above, appellant fails to support this claim with corroborating evidence. Further,

appellant and his trial counsel had a duty to make a "serious effort" of their own to investigate Jennings as a potential witness. The summary of Jennings' interview indicates that she knew appellant "very well." In both *Townsend* and *Wilson*, this court found significant the fact that the defendants in those cases knew the allegedly "newly discovered" witnesses. Despite the fact that Jennings knew appellant, appellant offers no evidence that he exerted any effort to investigate her.

{¶16} Moreover, contrary to appellant's assertion, the fact that he was in custody as he awaited trial does not establish that he was unavoidably prevented from discovering Jennings as a potential witness. As noted above, appellant was represented by trial counsel, who could have discovered Jennings during the course of his own investigation. *Townsend* at ¶10-11; *Wilson*. Nor does appellant's post-trial incarceration justify his failure to discover Jennings earlier. *Berry* at ¶40 ("[T]he fact of a defendant's incarceration, without more, does not equate to clear and convincing evidence that he was unavoidably prevented from discovering the evidence within the time parameter established by Crim.R. 33(B)"). Moreover, appellant's incarceration clearly did not impede his ability to discover Jennings' statement. Appellant admits that he obtained the summary of her police interview while incarcerated in state prison. *State v. Applewhite*, 9th Dist. No. 3250-M, 2002-Ohio-1739 (defendant's incarceration did not justify untimely new trial motion, as "[d]efendant obtained the alleged new evidence while he was incarcerated and he has failed to explain the delay").

{¶17} In addition, appellant does not state exactly *when* he obtained Jennings' interview summary from the police department, except to say that he "just recently discovered" Jennings' statement. Nor does appellant state exactly *how* he obtained the

summary, except to say that "he decided to get his case file from the police department." Such vague statements do "not rise to the level of clear and convincing proof that defendant was unavoidably prevented from discovering the [summary] before he filed the motion for new trial." *State v. Brown*, 8th Dist. No. 80553, 2002-Ohio-3635, ¶49 (affidavit stating that defendant's sister recently obtained police report and sent it to defendant was insufficient under Crim.R. 33(B)).

{¶18} Moreover, without knowing exactly when or how appellant obtained the summary of Jennings' interview, it is impossible to determine whether he filed his motion within a reasonable time after receiving it. A " 'trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence.' " *Berry* at ¶37, quoting *State v. Griffith*, 11th Dist. No. 2005-T-0038, 2006-Ohio-2935, ¶15. Indeed, in *Berry*, we explained that "[w]ithout some standard of reasonableness in filing a motion for leave to file a motion for new trial, a defendant could wait before filing his motion in the hope that witnesses would be unavailable or no longer remember the events clearly, if at all, or that evidence might disappear. The burden to the state to retry the case might be too great with the passage of time. A defendant may not bide his time in the hope of receiving a new trial at which most of the evidence against him is no longer available." *Id.* at ¶39, quoting *State v. Stansberry* (Oct. 9, 1997), 8th Dist. No. 71004.

{¶19} In sum, appellant does not explain the investigative actions taken or why he was unavoidably prevented from discovering Jennings as a potential witness. As we averred in *Townsend*, "[t]o grant appellant's motion for leave to file [a] delayed motion for new trial would reward appellant for his failure to perform a proper pretrial investigation." *Townsend* at ¶13. Accordingly, we find that the trial court did not abuse its discretion in

determining that appellant failed to demonstrate by clear and convincing proof that he was unavoidably prevented from discovering Jennings or her statement to police within the time limitation set forth in Crim.R. 33(B).

{¶20} We turn now to consideration of the trial court's decision dismissing appellant's petition for postconviction relief. Initially, we note that a reviewing court may not reverse a trial court's decision dismissing a postconviction petition absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶58.

{¶21} Appellant filed his postconviction petition well past the 180-day deadline set forth in R.C. 2953.21(A)(2). R.C. 2953.23(A)(1)(a) and (b) provides that a court may not entertain an untimely postconviction petition unless both of the following apply:

Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

The foregoing criteria are jurisdictional in nature. *State v. Raines*, 10th Dist. No. 03AP-1076, 2004-Ohio-2524, ¶5.

{¶22} Appellant does not assert a claim based upon any new retroactive right recognized by the United States Supreme Court, so he may satisfy R.C. 2953.23(A)(1)(a)

only by showing that he was unavoidably prevented from discovering Jennings as a potential witness. As discussed above, appellant has failed to make this showing. Appellant having failed to establish either of the criteria set forth in R.C. 2953.23(A)(1)(a), the trial court was not required to address the outcome-determinative requirement in R.C. 2953.23(A)(1)(b). Accordingly, the trial court did not abuse its discretion in dismissing appellant's petition for postconviction relief for want of jurisdiction.

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

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
