

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-920
Plaintiff-Appellee,	:	(C.P.C. No. 12CR-1462)
v.	:	
	:	(REGULAR CALENDAR)
Nicholas J. Newton,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 21, 2015

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

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Nicholas J. Newton, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion for new trial.

{¶ 2} Appellant was previously convicted of aggravated murder with a firearm specification, robbery, carrying a concealed weapon, and tampering with evidence after a jury trial, and this court affirmed his conviction in *State v. Newton*, 10th Dist. No. 13AP-500, 2014-Ohio-1958. The convictions stemmed from an incident in which appellant's friend, Langston Garrett, snatched the purse of Katrina Butts after she exited a pawn shop. Appellant then shot and killed Butts's boyfriend, Barry Windle, during a

confrontation in an alley after the purse snatching. On June 23, 2014, appellant filed an appeal with the Supreme Court of Ohio.

{¶ 3} On August 21, 2014, appellant filed a motion for new trial with the trial court. Appellant's motion was based on the discovery of new DNA evidence, after the Columbus Division of Police began reinterpreting DNA test results in certain cases based on the most recent testing standards and generating new DNA reports as a result of changes in the interpretation and reporting guidelines. Appellant argues that the original DNA lab report indicated the rifle used in the murder contained DNA from only appellant, who was a major donor, and Garrett, who was a minor donor, but the revised June 28, 2014 DNA lab report revealed that the DNA of at least three individuals was on the rifle.

{¶ 4} The State of Ohio, plaintiff-appellee, countered in its memorandum contra appellant's motion for new trial that: (1) the trial court lacked jurisdiction because appellant had filed an appeal with the Supreme Court, (2) appellant's motion was untimely, and he failed to seek leave of the court before filing the motion, and (3) regardless of the jurisdictional and timeliness issues, appellant was indicated as the primary donor in both reports, and other evidence at trial supported that he was the perpetrator.

{¶ 5} On October 9, 2014, the trial court denied appellant's motion for new trial without comment. Appellant appeals the judgment, asserting the following assignment of error:

When the trial court denied Appellant's new trial motion without first conducting an evidentiary hearing it abused its discretion and violated Appellant's due process rights contained in the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1 and 16 of the Ohio Constitution as well as Crim.R. 33(A).

{¶ 6} Appellant argues in his sole assignment of error that the trial court erred when it denied his motion for new trial. Crim.R. 33(B) provides:

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed

within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

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.

{¶ 7} Thus, 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. *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3837, ¶ 13. Under the first step, the defendant must demonstrate that she was unavoidably prevented from discovering the evidence relied on to support the motion for new trial. *Id.* A defendant is "unavoidably prevented" from discovering the new evidence within the time period for filing a motion for new trial when the 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." *Id.*, citing *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244. Under 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." *Id.* at ¶ 13.

{¶ 8} In the present case, appellant failed to seek leave to file his motion for new trial outside the 120 days following the verdict. The state contends that, because appellant did not obtain leave, the trial court properly dismissed the motion. Appellant counters that the seeking of leave from the court prior to filing a motion for new trial is not always necessary, especially in circumstances where the motion contains proof that the defendant was unavoidably prevented from discovering the new evidence.

{¶ 9} The trial court did not explain why it denied appellant's motion for new trial. However, even if the trial court denied the motion based on its merits, we find the

trial court did not err in doing so without an evidentiary hearing. A motion for new trial, pursuant to Crim.R. 33, is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71 (1990), paragraph one of the syllabus. It is also within the discretion of the trial court to determine whether a motion for new trial and the material submitted with the motion warrants an evidentiary hearing. *State v. Hill*, 64 Ohio St.3d 313, 333 (1992). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} To warrant the granting of a motion for a new trial in a criminal case, based on the grounds 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. *State v. Petro*, 148 Ohio St. 505 (1947), syllabus.

{¶ 11} In support of his motion for new trial, appellant argues that because the new test revealed a DNA mixture of at least three individuals on the rifle, and only evidence of two individuals (appellant and Garrett) existed in the original DNA test, the new DNA test raised the possibility that appellant was not responsible for the offenses. Appellant points out that no one ever identified him as the shooter and Garrett never saw him with a rifle at the time of the incident. Furthermore, Butts claimed to have spoken to the shooter, but Garrett testified neither he nor appellant spoke to Butts. Appellant maintains that the new DNA test indicates a strong probability that appellant did not discharge the rifle, and the new DNA test would have permitted him to offer the jury an alternative suspect as the shooter.

{¶ 12} However, we find that the new DNA test does not disclose a strong probability that it would change the result if a new trial is granted. Despite appellant's main argument that the new DNA test showed a mixture of at least three individuals, while only appellant's and Garrett's DNA profiles were found in the first DNA test, both reports identify appellant as the major contributor and provide the same statistical

frequencies for that DNA in the population. Furthermore, the original DNA test was not the only evidence produced at trial that demonstrated appellant's guilt. Other evidence was produced at trial that provided additional proof of appellant's guilt. Garrett testified as to appellant's involvement in the planning of the purse snatching, and a surveillance video produced at trial showed appellant and Garrett together near a pawn shop waiting for Butts to exit so Garrett could snatch her purse. Garrett stated that after he snatched her purse, he fled the scene by jumping over backyard fences, and he heard gunshots while he was fleeing. One or two days after the incident, appellant told Garrett that he shot a man in an alley after Garrett snatched the purse. In addition, Sabrina Baker, a friend of appellant's family, testified that several days after the incident, appellant, who was staying at her house at the time, told her that Garrett had robbed a woman and appellant accidentally shot Windle in an alley during a physical confrontation after the robbery. There was also testimony from Amy Amstutz, a forensic scientist at the Columbus Police Crime Laboratory, that the bullet casings recovered at the scene of the crime were fired from the rifle on which appellant's DNA was found. Therefore, it is clear that there was other evidence supporting appellant's conviction other than the DNA test. Given the new DNA test in no way exonerated appellant of the crime and still identified him as the major contributor of DNA on the murder weapon, and when viewed in light of the other evidence presented at trial supporting appellant's conviction, we cannot say the trial court abused its discretion when it denied appellant's motion for new trial without an evidentiary hearing. Appellant's assignment of error is overruled.

{¶ 13} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and HORTON, JJ., concur.
