

[Cite as *State v. Woodward*, 2009-Ohio-4213.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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| State of Ohio,       | : |   |
|                      | : |   |
| Plaintiff-Appellee,  | : |   |
|                      | : |   |
| v.                   | : | No. 08AP-1015<br>(C.P.C. No. 01CR11-6694) |
|                      | : |   |
| Myzell Woodward,     | : | (REGULAR CALENDAR)                        |
|                      | : |   |
| Defendant-Appellant. | : |   |

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D E C I S I O N

Rendered on August 20, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

*Carpenter, Lipps & Leland, LLP*, and *Kort Gatterdam*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Myzell Woodward, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for new trial. Because the trial court did not abuse its discretion, we affirm that judgment.

{¶2} In 2001, appellant was charged with one count of aggravated murder in violation of R.C. 2903.01, with a death penalty specification, and two counts of felonious assault in violation of R.C. 2903.11. All three counts included firearm specifications

pursuant to R.C. 2941.144 and 2941.145. The charges arose from the shooting death of Michael Rispress.

{¶3} In summary, the testimony presented at appellant's 2002 trial indicated that Rispress crashed his car into a car that was parked on Berkeley Road. After the collision, Rispress continued to drive a short distance to his house. He then got out of his car to check the damage to the other car. Demitra Givens, who lived at 411 Berkeley Road, owned the car. Although she was asleep at the time, three people were on her front porch and observed the accident: Maurice Stewart, appellant, and Tequilla Byrd. After the crash, Stewart took out a handgun and told appellant to get his gun. Appellant got his gun and the two men went to find the driver of the car. Appellant and Stewart found Rispress. They fired a number of shots at Rispress, killing him.

{¶4} A jury found appellant not guilty of aggravated murder but guilty of the lesser included offense of murder, as well as a firearm specification.<sup>1</sup> The jury also acquitted appellant of the two felonious assault charges. This court affirmed. *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418.

{¶5} In 2008, appellant filed, pursuant to Crim.R. 33, a motion for leave to file a motion for new trial as well as a motion for new trial. Appellant's motions were premised on newly-discovered evidence: Stewart's recanted testimony. Specifically, Stewart testified at appellant's trial that he and appellant, whom he identified as "Scoop," shot and killed Rispress. For his role in Rispress's death, Stewart pled guilty to one count of involuntary manslaughter with a firearm specification and received a nine-year prison

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<sup>1</sup> The other firearm specification had been dismissed at trial.

sentence. *Woodward* at ¶19. As part of his plea agreement with the state, Stewart agreed to testify truthfully against appellant.

{¶6} In an affidavit attached to appellant's motion for new trial, Stewart recanted his identification of appellant as "Scoop" and his testimony that he and appellant shot and killed Rispress. He alleged that another person with the nickname "Scoop" killed Rispress. Stewart alleged that the prosecutor offered him a deal if he would link appellant to the murder. He identified appellant because he was scared that he would receive the death penalty.

{¶7} The trial court held a hearing on appellant's motion for new trial. At the hearing, Stewart testified that appellant was not the person who shot and killed Rispress. In fact, Stewart testified that the first time he ever saw appellant was when he testified against him at trial. He testified that the prosecutor, as well as his defense counsel, told him to lie and to identify appellant as the person who shot and killed Rispress.

{¶8} Tom Beal, Stewart's attorney in 2002, testified at the hearing that he never told Stewart to lie to the prosecutor. Beal also testified that the prosecutor never told Stewart to lie or to implicate anyone in particular to receive his plea agreement. Beal testified that Stewart never identified anyone other than appellant as the other person who shot and killed Rispress. Through a stipulation, the prosecutor from appellant's trial in 2002 stated that he never told Stewart to lie or to implicate any specific person in the murder.

{¶9} The trial court denied appellant's motion for new trial, concluding that appellant failed to present newly discovered evidence that would support granting a new trial.

{¶10} Appellant appeals and assigns the following error:

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS OF LAW GUARANTEED UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶11} Appellant contends in his assignment of error that the trial court erred by denying his motion for new trial based on newly discovered evidence.<sup>2</sup> We disagree.

{¶12} Crim.R. 33(A) provides the grounds upon which a defendant may receive a new trial. As relevant here, Crim.R. 33(A)(6) provides that a defendant may be granted a new trial "[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."

{¶13} 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. Crim.R. 33(B). Appellant filed his motion for new trial more than six years after his guilty verdict. Therefore, pursuant to Crim.R. 33(B), appellant was required to file a motion for leave to file an untimely or delayed motion for new trial. *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, ¶16; *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶19. To obtain leave to file a delayed motion, the defendant must demonstrate by clear and convincing proof that he or she was "unavoidably prevented" from discovering the evidence relied upon to support the motion for new trial within the 120-day period. *State v. Bush*, 10th Dist. No. 08AP-627, 2009-Ohio-441, ¶8. A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the

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<sup>2</sup> Although appellant's motions were also premised on prosecutorial misconduct, a claim the trial court rejected, he does not argue that ground in this appeal.

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. *Berry* at ¶19, citing *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶7.

{¶14} The trial court determined that appellant was unavoidably prevented from discovering Stewart's recanted testimony. We agree. Even if appellant knew or believed that Stewart's trial testimony was false, he would have had no reason to suspect that Stewart would recant that testimony until Stewart told appellant in 2005 that he would change his testimony and "tell the truth." (Tr. 71.) *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶15. Therefore, we reject the state's argument that appellant was not unavoidably prevented from discovering Stewart's recanted testimony simply because Stewart was subject to cross-examination at trial. Stewart's cross-examination provided no reason for appellant to suspect that Stewart would later recant his trial testimony.

{¶15} In addition to demonstrating that he was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial, appellant also had to show that he filed his motion for leave within a reasonable time after discovering the evidence relied upon to support the motion for new trial. *Berry* at ¶37; *State v. Elersic*, 11th Dist. No. 2007-L-104, 2008-Ohio-2121, ¶20; *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶49. If there has been a significant delay, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay. *Id.*

{¶16} Here, appellant learned sometime in 2005 that Stewart would recant his trial testimony. However, appellant did not obtain an affidavit from Stewart until September

2007. Appellant did not file his motion for leave to file motion for new trial until February 2008. Appellant's only explanation for this delay was that it took some time to contact his attorney and that it took time for his attorney to investigate the new testimony.

{¶17} The trial court determined that appellant failed to file his motions within a reasonable time after discovering Stewart's recanted testimony. Although we appreciate the logistical difficulties an inmate faces in trying to communicate with a lawyer, the trial court did not abuse its discretion in concluding this explanation does not justify appellant's delay of more than two years before filing his motions. See *id.* at ¶53 (citing cases where defendant failed to adequately explain lengthy delays in filing motions after discovering new evidence).

{¶18} Notwithstanding the trial court's finding that appellant failed to file his motion for leave to file a motion for new trial within a reasonable time after discovering Stewart's recanted testimony, the trial court proceeded to address the merits of appellant's motion for new trial. In the interest of justice, we will address the merits of appellant's motion for new trial as well.

{¶19} 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* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus; *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶82. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶20} Appellant presented Stewart's recanted testimony as his newly discovered evidence. Recantation by a significant witness does not, as a matter of law, entitle the defendant to a new trial. *State v. Walker* (1995), 101 Ohio App.3d 433, 435. A witness's recantation of testimony can be newly discovered evidence if the court finds the new testimony credible and if the new testimony would materially affect the outcome of the trial. *State v. Burke*, 10th Dist. No. 06AP-686, 2007-Ohio-1810, ¶18, citing *Toledo v. Easterling* (1985), 26 Ohio App.3d 59.

{¶21} In determining the credibility of a witness's recanted testimony, newly discovered evidence that recants testimony given at trial is looked upon with the utmost suspicion. *State v. Jones*, 10th Dist. No. 06AP-62, 2006-Ohio-5953, ¶25; *State v. Covender*, 9th Dist. No. 07CA009228, 2008-Ohio-1453, ¶11; *State v. Saban* (Mar. 18, 1999), 8th Dist. No. 73647. See also *United States v. Chambers* (C.A.6, 1991), 944 F.2d 1253, 1264 ("Recanting affidavits and witnesses are viewed with extreme suspicion."). This is because the witness, by making contradictory statements, either lied at trial, in the current testimony, or both times. *Jones*, citing *United States v. Earles* (N.D.Iowa1997), 983 F.Supp. 1236, 1248.

{¶22} Because it is the trial court's obligation to measure the credibility of witnesses, in order to grant a motion for new trial based on recanted testimony, the trial court must be reasonably well satisfied that the trial testimony initially given by the witness was false (and, by implication, that the recanted testimony is credible and true). *Cleveland* at ¶56; *Jones* at ¶25; *Covender*. If a trial court determines that a witness's recanted testimony is to be believed, i.e., is more credible than the witness's trial testimony, the trial court must then determine whether the new testimony would materially

affect the outcome of the trial. *Id.* at ¶12; *State v. Perdue*, 7th Dist. No. 04 MA 119, 2005-Ohio-2703, ¶18. See also *Burke*, quoting *Easterling* ("The recantation must so affect the character of the evidence that there is a strong probability that a different verdict would result.'").

{¶23} The trial court observed Stewart testify at the hearing. It is clear from the trial court's decision that it did not believe Stewart's recanted testimony. Although Stewart placed his plea agreement with the state at risk by recanting his testimony, the trial court's finding that Stewart's recanted testimony was not credible was not an abuse of discretion. Stewart's allegation that he was told to falsely identify appellant as the person who participated in Rispress's murder in order to receive a plea agreement was flatly contradicted by both his own counsel as well as the prosecutor. In fact, Stewart's trial counsel testified that Stewart never identified anyone other than appellant as the other shooter. Moreover, in his original testimony, Stewart repeatedly denied that he had been told how to testify or who to identify to get his plea agreement.

{¶24} In addition, three other witnesses identified appellant as Scoop, and placed him with Stewart at the crime scene when the shooting occurred.<sup>3</sup>

{¶25} Dimitra Givens dated appellant for a period of time and knew him as Scoop. She testified that Stewart and appellant were together on her front porch when she went to sleep the night of the shooting. Sometime after gunfire woke her up, Stewart entered her house and handed her a gun. He asked her to get rid of it. Givens's mother also

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<sup>3</sup> Appellant maintains that these witnesses were trying to protect the "real Scoop" by identifying appellant. Appellant presented no evidence to support this theory.

testified that she knew appellant from his involvement with her daughter. She knew him as Scoop.

{¶26} Tequilla Byrd was a good friend of Givens and testified that appellant was Givens's boyfriend. She often bought drugs from appellant at Givens's house. She further testified that she was on Givens's front porch with Stewart and appellant when they saw Rispress's car crash into Givens's car. She testified that Stewart pulled out a gun and told appellant to get his gun. Appellant returned with a gun and the two men left the house. Byrd then heard gunshots.

{¶27} Finally, Nicole Allen also testified that she was friends with Givens. She identified appellant, Givens's boyfriend, as Scoop. She also testified that shortly after the shooting, Stewart and appellant showed up at her house together and asked her to rent them a car.

{¶28} In light of this evidence, we cannot say that the trial court abused its discretion when it found that Stewart's recanted testimony lacked credibility.

{¶29} Accordingly, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and CONNOR, JJ., concur.

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