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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

SHAWN COLLINS
Defendant

Case No: CR-06-488472-A

Judge: SHIRLEY STRICKLAND SAFFOLD

INDICT: 2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3
2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3
2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3
ADDITIONAL COUNTS...

JOURNAL ENTRY

OPINION ON DEFENDANT'S MOTION FOR NEW TRIAL SIGNED, ATTACHED AND ORDERED FILED. OSJ. CLERK ORDERED TO SEND COPY OF THIS ORDER TO STATE OF OHIO AND PLAINTIFF'S ATTORNEY.

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Judge Signature Date

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CUYAHOGA COUNTY

HEAR
03/25/2019

STATE OF OHIO	)	
	)SS:	IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY	)	

STATE OF OHIO	)	
	)	Case No. CR-06-488472
Plaintiff,	)	
	)	
-vs-	)	
	)	OPINION ON DEFENDANT'S
	)	MOTION FOR NEW TRIAL
SHAWN COLLINS,	)	
	)	
Defendant.	)	

SHIRLEY STRICKLAND SAFFOLD, JUDGE:

The Defendant's, Shawn Collins (hereinafter "Defendant"), Second Motion for Leave to File a Motion for New Trial (hereinafter "Second Motion"), filed November 28, 2018, is hereby denied without evidentiary hearing.[1][2]

I. FACTUAL BACKGROUND:

Defendant was charged with a five count indictment for violations of Ohio Revised Code §2911.01, Aggravated Robbery; with Firearm Specifications in violation of §2941.141 and §2941.145, related to an incident involving Gerald Henderson and Anthony Henderson that occurred on September 1, 2006. Defendant proceeded to jury trial on January 31, 2007. The State presented testimony from the two victims, Anthony Henderson and Gerald

[1] Defendant filed his first Motion for Leave to File Motion for New Trial (hereinafter "First Motion") on February 04, 2009. This Court denied Defendant's First Motion on May 14, 2009.

[2] Defendant titled his second motion as a Motion for New Trial; however, pursuant to Ohio Criminal Rule 33, Defendant must file for leave of Court to file a motion for new trial when such motion is premised upon newly discovered evidence, and when filing 120 days after the date upon which the verdict was rendered. *Crim.R. 33(B).* As such, this Court will address Defendant's Motion for New Trial as a motion for leave to file a motion for new trial as required by Ohio Criminal Rule 33. Only Defendant's arguments pertaining to the motion for leave will be addressed in this Opinion, any arguments made as to the motion for new trial will not be addressed as they are not appropriately made without leave of Court.

Henderson, as well as Tenisha Murphy, Gerald Henderson's then-girlfriend; Veronica Murphy, Tenisha Murphy's mother; Shalonda White, Anthony and Gerald Henderson's friend; and Cleveland Police Officer Terancita Jones Green. Defendant called four witnesses in his defense: Lashanda Barnett, Gregory Crayton, Chalina Hamilton, and Kenneth Evans; all of whom were friends of the Defendant who were present the night of the robbery.

The Court of Appeals has previously stated relevant facts in this matter, in Defendant's previous appeal, and this Order will incorporate those factual findings without recitation.[3]

The Court; however, will specifically note certain portions of Tenisha Murphy's testimony in relation to the new affidavit filed in Defendant's Second Motion. Tenisha Murphy testified at trial, as well as at Defendant's bindover hearing, that Defendant was the person who robbed the victims, Anthony and Gerald Henderson. Tenisha Murphy also testified that she had seen Defendant wearing all black earlier on the day of the attack and that Defendant was wearing the same clothes at the time of the attack along with a scarf over his face. She also testified that she heard Kenneth Evans say, "Shawn, stop" to which the Defendant responded: "Don't say my name." Tenisha Murphy further testified at trial that she did not want to appear in court because Defendant's family was threatening her, and that she would not have appeared had she not been subpoenaed.

A jury returned a verdict on February 2, 2007, finding Defendant guilty of three counts of Aggravated Robbery, in violation of Ohio Revised Code §2911.01, with Firearm Specifications, in violation of §2941.141 and §2941.145, on counts 1, 3, and 4 of the indictment, and guilty of Felonious Assault, in violation of §2903.11, with Firearm

[3] *State v. Collins,* 8th Dist. Cuyahoga No. 89529 (Mar. 12, 2008).

Specifications, in violation of §2941.141 and §2941.145, on count 5 of the indictment. Defendant was found not guilty as to count 2 of the indictment for Aggravated Robbery, in violation of §2911.01, with Firearm Specifications, in violation of §2941.141 and §2941.145. Defendant was sentenced to a total prison term of 23 years by this Court.

On September 10, 2007, Defendant's co-defendant, Trayvon Little, plead guilty to one count of Aggravated Robbery, in violation of §2911.01, in relation to the robbery. *State v. Little,* Cuyahoga Case No. CR-07-492922-A. He was sentenced to three years that ran concurrent to his six year conviction in case *State v. Little,* Cuyahoga Case No. CR-07-496733.[4]

II. LAW AND ARGUMENT:

In order for Defendant to be able to file a motion for new trial based on newly discovered evidence beyond the 120 days prescribed in Rule 33(B), Defendant must first file a motion for leave showing by clear and convincing evidence that he has been unavoidably prevented from filing a motion for new trial in a timely fashion. *State v. Gray,* 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶13. Courts have held that the "clear and convincing evidence" standard is defined as that "measure or degree of proof which is more than a mere 'preponderance of the evidence'" but is below the standard of 'beyond a reasonable doubt' in criminal cases, and "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at ¶14, quoting *Cross v. Ledford,* 161 Ohio St. 469, 469, 120 N.E.2d 118 (1954). To prove that he was unavoidably prevented from filing his motion for new trial, Defendant must demonstrate by clear and convincing evidence that he had no knowledge of the existence of the evidence or grounds supporting a motion

[4] Case misspells Trayvon's name as "Trayvone"

for new trial, and that he could not have learned of the existence of such evidence in the exercise of reasonable diligence within the time provided by the Rule 33(B). *Id.* at ¶17. Further, the Defendant must show he filed his motion for leave within a reasonable time after uncovering the "newly discovered evidence" upon which he relies for the motion for new trial. *Id.* at ¶18.

Furthermore, Ohio courts acknowledge that this Court is not required to proceed with an evidentiary hearing on Defendant's Second Motion. A determination as to "whether to conduct an evidentiary hearing on a motion for leave to file a motion for new trial is discretionary and not mandatory." *State v. Phillips,* 2017-Ohio-7164, 95 N.E.3d 1017, ¶19 (8th Dist.). Defendant is only entitled to a hearing if he "submits documents which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *Id.* Accordingly, "where neither the motion nor the supporting affidavits embody prima facie evidence of unavoidable delay," no hearing is required and leave may be summarily denied. *Id.*

Defendant has submitted four affidavits along with his Second Motion, which he argues constitute "newly discovered evidence" supporting his request to file a motion for new trial beyond the time prescribed by Criminal Rule 33(B). Two of the affiants, Dashun Rodgers and Raynell Collins, are Defendant's friends who did not testify at the trial, but state that they were with Defendant on the night of the robbery. An affidavit was also submitted by Defendant's co-defendant, Trayvon Little, who submits his second affidavit in which he states substantially the same things that he did in his first affidavit provided as part of Defendant's First Motion, which was submitted on February 4, 2009. The final affiant is Tenisha Murphy, who recants many of the statements she made during Defendant's trial.

Each affidavit will be evaluated under the above-referenced framework in determining whether to grant Defendant leave to file a motion for new trial. First, the Court will address the affidavit of Defendant's friend, Dashun Rodgers.[5] Mr. Rodgers claims that he was with Defendant on the night of the robbery and that he did not witness Defendant committing the robbery, but instead, that he observed Trayvon Little approach the victims and "jump" them. There is no indication in Mr. Rodgers' affidavit that he was unable to testify at Defendant's trial or was in any way prevented from presenting such information at the time of the trial. The affidavit of Raynell Collins is substantially similar to that of Mr. Rodgers.[6] Mr. Collins claims that he was with Defendant on the night of the robbery and did not witness Defendant interacting with the victims. Mr. Collins; however, did not witness the robbery or who was involved in it because he "did not want to see anybody get robbed so [he] began walking between Iroquis and Paxton." There is nothing in Mr. Collins' affidavit that explains why he was unable to provide this information at the time of trial.

On their face, neither of these affidavits show how Defendant was unavoidably prevented from discovering Mr. Rodgers and Mr. Collins' statements and observations at the time of trial. If the statements in these affidavits are true, then Defendant would have been able to provide the names of these individuals to his counsel at the time of trial because he would have been the one with them at the time the robbery occurred. There would have been no need for any other person to make Defendant aware of the existence of these individuals, other than the Defendant himself. Simply, if Defendant was in fact with Mr. Rodgers and Mr. Collins at the time of the robbery, he would have had knowledge of their

[5] Defendant's Exhibit 2.
[6] Defendant's Exhibit 4.

existence and been able to provide their names to his counsel at the time of trial to verify he was not involved in the robbery. There is absolutely no explanation for why it took twelve years for Defendant to locate and obtain the statements of Mr. Rodgers and Mr. Collins when he was supposedly with them at the time of the robbery. Therefore, Defendant fails to prove he was unavoidably prevented from discovering this "new evidence," and that waiting twelve years was a reasonable period of time to discover this evidence under the circumstances.

Next, the second affidavit of Defendant's co-defendant, Trayvon Little, will be addressed.[7] Mr. Little states that he was the one who committed the robbery, and that Defendant was not involved in any way. Mr. Little states that he approached the victims with two guns and robbed them while wearing a "red jacket, red hat, white t-shirt, black jeans and a blue bandana covering [his] face." After robbing the victims, Mr. Little left and returned a short time later to attempt to get the victims to leave, at which time Kenneth Evans said, "Trayvon" to which Mr. Little told Mr. Evans not to use his name. Mr. Little further claims that he never told anyone that Defendant was not involved, and that he was the sole perpetrator, because "no one ever asked" him and he assumed that he could explain it to someone when he and the Defendant "appeared together in court," but that opportunity never arose. Much of the information provided in Mr. Little's second affidavit mirrors the statements he made in his first affidavit supporting Defendant's First Motion, filed on February 4, 2009.[8] The only difference between the two affidavits is that Mr. Little states in his first affidavit that he was wearing a "red hat/black t-shirt/and blue jeans with a blue bandana covering [his] face" and that after the robbery he "ran from the area and changed

[7] Defendant's Exhibit 3.
[8] State's Exhibit A.

[his] outfit which was [*sic*] into a pair of black jeans/and a white t-shirt" and that the person who used his name in front of the victims was "Tanisha" [*sic*].

On May 14, 2009, this Court denied Defendant's First Motion, filed on February 4, 2009, which was supported by Trayvon Little's first affidavit. There is no substantially new information provided by Mr. Little in his second affidavit that was not included in his first affidavit. Defendant was unable to provide evidence that Mr. Little's statement was not available at the time of trial in his First Motion, thus his motion was denied in 2009. Defendant provides no explanation as to why he was unable to obtain Mr. Little's statement during the time of trial, nor any time in the preceding twelve years before filing his Second Motion on November 28, 2018. At a minimum, Defendant was aware of Mr. Little's statement when he filed it as the basis for his First Motion, and yet he still waited almost ten years to file his Second Motion. There can be no credible argument that Defendant was unavoidably prevented from discovering Mr. Little's statement and that the twelve year delay in introducing it was reasonable, as even this Court has been aware of it since 2009, when Defendant provided it to the Court in his First Motion. For Defendant to argue that Mr. Little's statement should be considered "newly discovered evidence" for purposes of granting him leave to file a motion for new trial is disingenuous and without any justification.

Finally, Tenisha Murphy's affidavit will be addressed.[9] First, the Court notes that Ms. Murphy was the only person whose affidavit was provided in Defendant's Second Motion, and who testified at Defendant's trial. Ms. Murphy makes certain statements in her affidavit directly contradicting her sworn testimony at trial. Specifically, Ms. Murphy states in her affidavit that she did not recall Defendant wearing black at any point that day; that she

[9] Defendant's Exhibit 1.

witnessed two individuals approach the victims and knew that one of them was Trayvon Little, but was unsure as to the other individual; and that she was pressured by two uniformed police officers at her school to testify against Defendant at his trial. Ms. Murphy further states in her affidavit that she "lied during [Defendant]'s trial when [she] testified that [Defendant] was the one who approached the porch and robbed Anthony and Gerald Henderson because [she] was scared." Finally, Ms. Murphy states that she confided in Defendant's uncle that she has lied at Defendant's trial.

Defendant contends that Ms. Murphy's statements in her affidavit are consistent with the testimony at trial and the evidence presented by the defense, but this is simply untrue. Ms. Murphy's statements in her affidavit are in direct contradiction to her trial testimony; therefore, this Court will view her statements in her affidavit as a recantation of her earlier trial testimony.

When requesting a trial court to grant a new trial based upon the recanted testimony of an important witness, a defendant is essentially asking the court to determine when the witness was telling the truth. By itself, recantation of prior testimony by an important witness is not grounds for a new trial. *State v. Smith,* 8th Dist. Cuyahoga No. 100588, 2014-Ohio-4799, ¶13. Ohio courts have repeatedly held that "newly discovered evidence which purportedly recants testimony given at trial is 'looked upon with the utmost suspicion.'" *State v. Saban,* 8th Dist. Cuyahoga No. 73647, 1999 Ohio App. LEXIS 1068, at *14 (March. 18, 1999). This suspicion is justified because "the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both." *Gray,* at ¶29. Therefore, a witness's recantation of testimony should only be viewed as "newly discovered evidence" if the court finds that the new testimony is "credible and if the new testimony would affect the outcome

of the trial." *Id.* Therefore, the trial court must be reasonably convinced that the witness's trial testimony was false and therefore the recanted testimony is true and credible. *Id* at ¶30. A determination as to the truthfulness of the witness's statements is within the sound discretion of the trial court, particularly when the same judge resides over the trial as well as the ruling on the motion for leave for new trial, as is true in this case. *Saban* at *13.

This Court is convinced that Ms. Murphy's testimony at Defendant's bindover hearing as well as his trial, where she directly identifies Defendant as the perpetrator of the robbery of Anthony and Gerald Henderson committed on September 1, 2006, is the closest to the truth that Ms. Murphy ever presented. The events of that evening, as presented by Ms. Murphy at trial, closely align with the way multiple other witnesses observed the events of that evening. The testimony at trial indicated that Ms. Murphy left the porch as the gunman was approaching, and was therefore not present at the time of the actual robbery. This scenario was corroborated by the trial testimony of both the victims, Anthony and Gerald Henderson, as well as Ms. Murphy, Kenneth Evans, and Shalonda White. In fact, Ms. Murphy's own mother, Veronica Murphy, testified at trial that Ms. Murphy identified the Defendant as the robber the evening of the robbery.

This Court also finds it particularly illuminating that part of Ms. Murphy's recantation includes the individuals she states were pressuring her into testifying. Originally, at Defendant's trial, Ms. Murphy stated that she did not want to appear and testify against Defendant because Defendant's family was threatening her, and that she would not have appeared at trial had it not been for the State subpoenaing her. However, in Ms. Murphy's affidavit, she testifies that it was Cleveland police officers who threatened her to testify against Defendant, and that she did not want to testify against Defendant, but was compelled

to do so out of fear. The Court finds much more validity to the claim that Defendant's family and friends were threatening witness, instead of Cleveland police officers, based upon multiple accounts at trial. These accounts include: Ms. Murphy's mother, Veronica Murphy, who testified that the main reason that she ended up moving away from the area where this robbery occurred is because Ms. Murphy was being threatened, Gerald Henderson who testified at trial that Defendant's sister was threatening him after the robbery, and Officer Terancita Jones Green who testified that both Ms. Murphy and Shalonda White were being threatened as a result of witnessing the robbery. Officer Green testified that Ms. Murphy and Shalonda White's fear, due to the threats, was so profound that they were both removed from class for their protection. This Court is extremely skeptical of the reason for Ms. Murphy's change of testimony in light of the allegation of threats against her as testified to at trial. Accordingly, this Court does not find Ms. Murphy's statement in her affidavit, made twelve years after the trial in this matter, and in direct contradiction to her own testimony as well as numerous other witnesses at trial, to be credible.

For purposes of determining whether Ms. Murphy's recanted testimony should be construed as "newly discovered evidence" for purposes of granting leave to file a motion for new trial, the Court must finally determine whether Defendant was unavoidably prevented from discovering Ms. Murphy's statements in her affidavit. Ms. Murphy testified in her affidavit that after Defendant's trial she met with Defendant's uncle and told him she had lied at trial. Although there is no indication of when Ms. Murphy discussed her supposed dishonesty with Defendant's uncle, her stated reason for lying was that she was "young and scared," which indicates it most likely occurred closer to the time of trial, if it occurred at all. There is nothing provided in Ms. Murphy's affidavit that is new information, or a new

revelation to Ms. Murphy herself, Ms. Murphy simply recants various parts of her trial testimony without any indication as to the reason.

Ultimately, this Court is not convinced, even assuming Ms. Murphy had testified at trial as she is testifying now in her affidavit, that the outcome of the case would be different. The overwhelming evidence provided by various witnesses, including Ms. Murphy's own mother, indicates that Defendant was responsible for the robbery, and that his family and friends were threatening the witnesses to change their testimony and/or not testify against Defendant.

Therefore, as this Court is not convinced of the credibility of Ms. Murphy's contradictory testimony as provided in her affidavit, nor that Ms. Murphy's recanted testimony would have materially changed the outcome of the trial, her affidavit will not be construed as "newly discovered evidence" for purposes of leave to file a motion for a new trial.

III. CONCLUSION:

Accordingly, Defendant's Second Motion for Leave to File a Motion for New Trial is hereby denied.

IT IS SO ORDER.

3/25/19
Date

Judge Shirley Strickland Saffold