State v. Brown

2024-Ohio-792 (2024) | Cited 0 times | Ohio Court of Appeals | March 4, 2024

IN THE COURT OF APPEALS OF OHIO ELEVENTH APPELLATE DISTRICT TRUMBULL COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

FELIX O. BROWN, JR.,

Defendant-Appellant. CASE NO. 2023-T-0064

Criminal Appeal from the Court of Common Pleas

Trial Court No. 1995 CR 00127

O P I N I O N

Decided: March 4, 2024 Judgment: Affirmed

Dennis Watkins, Trumbull County Prosecutor, and Ryan J. Sanders, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Felix O. Brown, Jr., pro se, PID# A312-676, Grafton Correctional Institution, 2500 Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

EUGENE A. LUCCI, P.J.

{¶1} Appellant, Felix O. Brown, Jr., appeals the judgment of the Trumbull County

Court of Common Pleas, denying his Motion for Leave to File a Motion for New Trial. We

affirm.

{¶2} In 1995, a jury found appellant guilty of murder, in violation of R.C. 2903.02, with a firearm specification under R.C. 2941.145, and having weapons while under disability, in violation of R.C. 2923.13. Appellant was sentenced to an aggregate sentence of 18 years to life. Appellant appealed his conviction which was upheld by this court in State v. Brown, 11th Dist. Trumbull Nos. 95-T-5349, 98-T-0061, 2000 WL 522339 (Mar. 31, 2000) Brown I appeal. State v. Brown, 89 Ohio St.3d 1455, 731 N.E.2d 1141 (2000).

{¶3} Nearly 15 years after his conviction, in September 2011, appellant filed a hybrid Civ.R. 60(B)/Crim.R. 47 motion alleging a misnomer in his indictment and an error in jury instructions. The trial court overruled the motion, and this court affirmed the denial based upon the doctrine of res judicata. State v. Brown, 11th Dist. Trumbull No. 2011-T-0101, 2012-Ohio- Brown II

{¶4} In August 2016, appellant filed a second Crim.R. 47 motion to vacate void judgment in the trial court alleging the court erred by failing to instruct the jury on lesser-included offenses and on the defense of accident. The trial court denied the motion and this court affirmed. See State v. Brown, 11th Dist. Trumbull No. 2016-T-0105, 2017-Ohio-Brown III

{¶5} In December 2022, appellant filed the underlying Motion for Leave to File a Motion for New Trial, as well as an accompanying affidavit in support of his motion. The on August 24, 2023. This appeal follows.

{¶6} Appellant assigns seven facially, but not entirely substantively redundant errors together. They provide:

[1.] The trial court erred as a matter of law in overruling

[leave: to the prejudice of appellant. leave: to the prejudice of appellant.

[4.] The trial court erred as a matter of law and abused its prejudice of appellant.

[5.] The trial court erred as a matter of law in overruling . [6.] The trial court erred as a matter of law in overruling

[7.] The trial court erred as a matter of law and abused its

{¶7} Crim.R. 33(B) account of newly discovered evidence shall be filed within one hundred twenty days after

the day upon which the verdict was rendered * * *. 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.

{¶8} Crim.R. 33 permits a convicted defendant to

file a motion for a new trial within 120 days after the day of the verdict on grounds of

newly discovered evidence. However, * * * when a motion based on newly discovered

evidence is filed more than 120 days after the verdict, the defendant must first file a motion

to seek leave to file a delayed motion. State v. ONeil, 11th Dist. Portage No. 2022-P-

0030, 2023-Ohio-1089, ¶ 21, quoting State v. Alexander, 11th Dist. Trumbull No. 2011-

T-0120, 2012-Ohio-4468, ¶ 14. If [the trial court] determines that the documents in

support of the motion on their face do not demonstrate that the movant was unavoidably State v. Trimble, 2015-Ohio-942, 30 N.E.3d 222, ¶ 16 (11th Dist.).

{¶9} One is unavoidably prevented from filing a motion for new trial if he or she had no knowledge of the 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. ONeil at ¶ 21, quoting Alexander at ¶ 17, quoting State v. Walden, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). ONiel at ¶ 26.

{¶10} produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶11} In support of his motion for leave, appellant attached four affidavits: his personal affidavit; an affidavit from Private Investigator Tom Pavlish; an affidavit from Juror Cathy Brunstetter; and an affidavit from Juror Adriane Perretti.

{¶12} Under his first assignment of error, appellant argues that the trial court misapplied the law regarding the affidavit submitted by Juror Perretti who sat on his trial. The juror averred that a person entered the jury room during deliberations to see how deliberations were going; the person allegedly indicated that the jury needed to continue deliberating until they reached a decision. Appellant asserted, without substantiation, the individual described in the affidavit was a court official. Appellant claims the trial court deliberation occurred in violation of R.C. 2945.33, which requires the jury to be under the charge of an officer and that officer shall not allow communications to the jury nor shall he or she make communications to the jury except to ask if the jury has agreed on a

verdict.

{¶13} The trial court determined that the foregoing argument lacked merit because appellant failed to demonstrate, by clear and convincing evidence, that he was unavoidably prevented from obtaining the evidence. We agree with the trial court.

{¶14} Misconduct of a court officer in communicating to the jury, in violation of

State v.

Adams, 141 Ohio St. 423, 430-431, 48 N.E.2d 861 (1943), paragraph three of the

State v. Abrams, 39 Ohio St.2d 53,

55-56, 313 N.E.2d 823 (1974); Bostic v. Connor, 37 Ohio St.3d 144, 149, 524 N.E.2d 881 (1988) (superseded by statute on other grounds). The presumption of prejudice, however, rests heavily upon the Government to

establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. State v. Murphy, 65 Ohio St.3d 554, 575, 605 N.E.2d 884 (1992), quoting Remmer v. United States, 347 U.S. 227, 229, 745 S.Ct. 450, 98 L.Ed. 654 (1954). {¶15} Initially, Juror Perretti did not aver that the alleged individual entering the jury- accordingly assumes, without supportive

evidence, that the individual was a court officer. This is problematic because without an averment that the individual was a member of court personnel, it is unclear what, if any impact the statements made by the individual would have had on the jury

{¶16} One obvious, if not the primary, bane R.C. 2945.33 is designed to avoid is

, who appears to be operating under

interrupts deliberations and provides improper direction

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. Because,

however, appellant did not establish the individual at issue was a court officer or

employee, it is not clear that the presumption of prejudice would necessarily attach.

{¶17} Even assuming this point is insufficient to fully argument, appellant failed to aver or set forth any material facts that he was unavoidably

prevented from obtaining the information elicited from Juror Perre davit. To

establish eligibility to obtain leave to file, a party must establish a firm belief or conviction

in the facts sought to be established. Appellant concedes he retained Private Investigator

Tom Pavlish on October 23, 2021, some 16 years after his conviction. The information

could have reasonably been obtained by appellant prior to the expiration of the 120 days

set therefore lacks merit.

{¶18} {¶19} his third and fourth assignments of error, appellant asserts the trial court erroneously

concluded that he did not offer clear and convincing evidence that he was unavoidably

appellant claims that

because, in his motion for leave, he stated he had been unavoidably prevented from

obtaining the evidence, the trial court erred in drawing a contrary conclusion. We do not

agree.

{¶20} Appellant neither avers nor offers a compelling basis regarding why the

evidence could not have been discovered with reasonable diligence. There is nothing to

indicate that appellant undertook any efforts to discover the evidence prior to October 2021, when the private investigator who interviewed the jurors was hired. Although interviews, it does not follow he was unavoidably prevented from discovering the evidence within 120 days of the verdict. Accordingly, the trial court properly concluded appellant obtain information from jurors in the 120-

{¶21}

{¶22} Under his second assignment of error, appellant argues the trial court erred

Allen

{¶23} The trial court determined that the so- Allen a United States Supreme Court case addressing the propriety of an instruction to a dead- locked jury and which is disfavored in Ohio jurisprudence, see State v. Howard, 42 Ohio

St.3d 18, 537 N.E.2d 188 (1989), was addressed and its content was approved in

direct appeal. See Brown I, 2000 WL 522339. *4-5. The trial

observation is accurate. Although appellant appears to argue the communication

identified in Juror affidavit was an illegitimate Allen his argument must

fail for the same reasons discussed in his previous argument. To wit, appellant failed to

establish the communication was made by a court officer, and he did not establish by

clear and convincing evidence that he was unavoidably prevented from discovering the

same within the timeframe established by rule.

{¶24} second assignment of error lacks merit.

{¶25} Under his fifth, sixth, and seventh assignments of error, appellant claims

the trial court erred in denying him leave to file his motion for new trial based upon Juror

Cathy affidavit. In her affidavit, Juror Brunstetter averred she Dr.

William Cox testifying that Mr. Brown put the weapon against [the head and

intentionally pulled the trigger. I recall Dr. Cox testifying that Mr. Brown pushed the gun

into her Appellant maintains, however, this aspect of the trial testimony was

omitted from the trial transcript. He therefore maintains he was denied due process

because, on appeal, the trial transcript was incomplete. We disagree.

{¶26} Appellant mistakenly claims that that Juror averments

indicate the trial transcript was altered. The content of the affidavit, however, merely

indicates the recollection of some of the substantive content of one expert witness.

While irregularities in the transcript were at issue in this case, these points were raised

on direct appeal and resolved by this court in Brown I. Id., 2000 WL 522339, at *10-11. Accordingly, the due process issue identified by appellant is barred by the

doctrine of res judicata.

{¶27} Moreover, appellant claims that the trial court erred in concluding

appellant did not establish he was unavoidably prevented from obtaining the evidence

contained in Juror affidavit. Appellant underscores that he had

no idea and no reason to and was therefore of the facts averred in the

affidavit. Nevertheless, for the reasons set forth under our analysis of first,

third, and fourth assignments of error above, this argument lacks merit.

{¶28} fifth, sixth, and seventh assignments of error are without merit.

{¶29} For the reasons discussed in this opinion, the judgment of the Trumbull

County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

ROBERT J. PATTON, J.,

concur.