IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-190535 TRIAL NO. B-1405034
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
DAMIAN CARLTON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Damian Carlton presents on appeal three assignments of error that may fairly be read together as challenging the Hamilton County Common Pleas Court's judgment overruling, without a hearing, his Crim.R. 33(B) motion for leave to move for a new trial. We affirm the court's judgment.

In 2015, Carlton was convicted of aggravated burglary and felonious assault and sentenced to consecutive prison terms totaling 19 years. He unsuccessfully challenged his convictions on direct appeal and in a series of postconviction motions filed between 2016 and 2019. *State v. Carlton*, 1st Dist. Hamilton Nos. C-150390 and C-150407 (June 22, 2016).

In his 2019 "Motion for Leave to File a Delayed Motion for New Trial," Carlton sought leave to move out of time for a new trial under Crim.R. 33(A)(6), based on newly discovered evidence that, he insisted, showed that he had been denied his constitutional rights to counsel and to the effective assistance of counsel. A new trial may be granted under Crim.R. 33(A)(6) on the ground that "new evidence material to the defense is

discovered, which the defendant could not with reasonable diligence have discovered and produced at trial." A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence must be filed either within 120 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted. Crim.R. 33(B).

On a Crim.R. 33(B) motion for leave to file a motion for a new trial on the ground of newly discovered evidence, the movant bears the burden of proving by clear and convincing evidence that he was "unavoidably prevented" from timely discovering the evidence upon which his new-trial motion depends. *See* Crim.R. 33(B); *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, ¶ 32. The decision concerning leave may not be overturned on appeal if it was supported by some competent and credible evidence. *Schiebel* at 74; *State v. Mathis,* 134 Ohio App.3d 77, 79, 730 N.E.2d 410 (1st Dist.1999), *rev'd in part on other grounds*, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912, ¶ 20 (1st Dist.).

Crim.R. 33(B), by its terms, contemplates a hearing. The nature of that hearing is discretionary with the court and depends on the circumstances. The court must conduct an evidentiary hearing if the evidence offered in support of the motion demonstrates unavoidable prevention. *See Carusone* at ¶ 4 and 33; *State v. Gaines*, 1st Dist. Hamilton No. C-090097, 2010-Ohio-895, ¶ 4.

Carlton supported his motion with "exhibits" consisting of pages one and six of the victim's medical records. He asserted that his trial counsel had been ineffective in failing to use those records to challenge the victim's competency to testify and to impeach her trial testimony. Those "exhibits" indicate that they were "generated" four months before trial. And the record shows that they were provided by the state in discovery and admitted into evidence at trial, and that the state and defense counsel examined the victim concerning them.

The remaining challenges presented in the motion depended for their resolution upon "exhibits" that were not filed with the motion. Of the missing "exhibits," those that purportedly show the victim's criminal record were, according to the state's response to the defense's discovery demand, to be provided if the matter proceeded to trial, which it did. Those records were not made a part of the record before us, either at trial or as offered in support of Carlton's multiple postconviction petitions and motions. The rest of the missing "exhibits" were provided in discovery or made a part of the record before us when offered at trial or in support of prior postconviction petitions and motions. The evidence demonstrably provided in discovery or offered at trial cannot, by definition, be "newly discovered." And Carlton failed to provide with his Crim.R. 33(B) motion for leave an affidavit attesting to when or how he had secured any of the evidence offered as "newly discovered."

Neither Carlton's Crim.R. 33(B) motion for leave, with its supporting evidentiary material, nor the record of the proceedings leading to his convictions, could be said to provide clear and convincing evidence that he had been unavoidably prevented from timely discovering the evidence upon which his new-trial motion depended. Thus, the common pleas court's decision overruling the motion for leave was supported by some competent and credible evidence. And the court did not abuse its discretion in denying leave without an evidentiary hearing. Accordingly, we overrule the assignments of error and affirm the court's judgment overruling the motion.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., BERGERON and **WINKLER, JJ.**

To the clerk:

Enter upon the journal of the court on September 30, 2020,

per order of the court_____.

Presiding Judge