

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

STATE OF OHIO,	:	APPEAL NO. C-250290
Plaintiff-Appellee,	:	TRIAL NO. B-9609928
vs.	:	
EDWARD SMITH,	:	<i>JUDGMENT ENTRY</i>
Defendant-Appellant.	:	

**NESTOR, Judge.**

This court sua sponte removes this cause from the regular calendar and places it on the court's accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

Defendant-appellant Edward Smith appeals the judgment of the Hamilton County Court of Common Pleas denying his motion for leave to file a motion for a new trial based on newly discovered evidence. Because Smith did not demonstrate that he was unavoidably prevented from discovering the new evidence upon which his motion for a new trial relies, we affirm the lower court's judgment.

In 1998, following Smith's conviction for murder, this court reversed the trial court's judgment and ordered a new trial. *See State v. Smith*, 130 Ohio App.3d 360 (1st Dist. 1998) (reversing defendant's conviction based on prosecutorial misconduct during closing argument). On remand, a jury once again found Smith guilty of murder and an accompanying firearm specification, and he received a 15-year-to-life sentence on the murder charge and a three-year sentence on the specification. Smith

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subsequently appealed his conviction, which this court affirmed. *See State v. Smith*, 2000 Ohio App. LEXIS 5082 (1st Dist. Nov. 3, 2000).

At Smith's trial, the State presented the testimony of Randall Rozier, the victim's cousin and an FBI agent based out of New York. Agent Rozier testified at trial that he had been visiting family in Cincinnati during the time the victim was shot and killed. Upon learning that Smith had recently had an argument with the victim over the amount of money the victim owed Smith for masonry work, Rozier spoke with one of Smith's employees and asked him for help locating Smith. The employee drove with Rozier to a storage unit used by Smith to house tools for his business. There, they found Smith parked inside the storage unit. The employee spoke with Smith and Rozier stayed in his car, although he explained that he did draw his gun after seeing a "look" on Smith's face as the employee approached him. Eventually, Rozier and the employee left, and, upon driving away, they observed Smith exit from the storage unit and drive away in the opposite direction. Finally, Rozier testified that after that incident, he asked the local police chief as well as his FBI supervisor if he could help with the investigation, but he was not given permission to do so.

Nearly 25 years after the trial, Smith sought leave under Crim.R. 33(B) to file a motion for a new trial based on his recent discovery of federal regulations, often referred to as *Touhy* regulations, which govern a federal employee's testimony in cases where the United States is not a party. *See* 28 C.F.R. § 16.21 et seq. Smith contends that the State suppressed the fact that Agent Rozier investigated Smith and testified against him in contravention of the *Touhy* regulations. Smith asserts that the suppression of this evidence deprived him of the opportunity to challenge Agent Rozier's credibility during cross-examination. He argues that the jury might have

questioned Rozier's testimony had they been aware of his failure to follow federal protocols.

The common pleas court denied Smith's motion without an evidentiary hearing, concluding that the *Touhy* regulations were in existence and available for Smith's use at the time of his trial and that his new-trial motion was meritless.

Smith now appeals, asserting in two assignments of error that the common pleas court abused its discretion by denying his motion for leave to file a new-trial motion without a hearing and for addressing the merits of his new-trial motion without first determining that he was unavoidably prevented from discovering the new evidence upon which he relies to support his new-trial motion. We review the denial of a Crim.R. 33(B) motion for abuse of discretion. *State v. Smith*, 2023-Ohio-3954, ¶ 6 (1st Dist.), citing *State v. Hatton*, 2022-Ohio-3991, ¶ 29.

A motion for a new trial based on newly discovered evidence must be filed within 120 days of the verdict. To obtain leave to file a delayed motion for a new trial based on newly discovered evidence, a defendant must demonstrate by "clear and convincing proof" that he was unavoidably prevented from discovering the evidence upon which the motion is based within the 120-day timeframe. Crim.R. 33(B). A defendant is unavoidably prevented from discovering new evidence if he had no knowledge of the existence of the new evidence and, in the exercise of reasonable diligence, could not have learned of its existence within the time prescribed for filing a motion for a new trial. *State v. Ojile*, 2021-Ohio-2955, ¶ 15 (1st Dist.). A defendant may also satisfy the "unavoidably prevented" requirement by showing that the State suppressed the evidence on which the defendant would rely when seeking a new trial. *State v. McNeal*, 2022-Ohio-2703, ¶ 2. Finally, a defendant is only entitled to a hearing on a motion for leave to file an untimely motion for a new trial if the defendant submits

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documents that “on their face” support his claim that he was unavoidably prevented from timely discovering the grounds for the motion. *State v. Smith*, 2020-Ohio-6718, ¶ 17 (1st Dist.), citing *State v. Carusone*, 2013-Ohio-5034, ¶ 4, 33 (1st Dist.).

Although the lower court did not explicitly use the term “unavoidably prevented” in its denial of Smith’s Crim.R. 33(B) motion, the statements within the court’s entry support a determination of unavoidable prevention. These statements can reasonably be interpreted to mean that Smith was not unavoidably prevented from discovering the existence of the *Touhy* regulations.

To the extent that Smith asserts that the *Touhy* regulations constitute new evidence for his new-trial motion, he has failed to demonstrate that he could not have discovered their existence through reasonable diligence at the time of trial or within 120 days following the jury’s verdict. The *Touhy* regulations were in existence at the time of Smith’s trial and had been since the 1950s. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-468 (1951). To the extent that Smith is arguing that he recently discovered that Rozier lacked permission to testify at trial in contravention of the *Touhy* regulations and that the State suppressed this evidence, he has not provided any evidence to substantiate this claim. The State did not conceal Rozier’s employment as an FBI agent; Rozier himself testified to this fact at trial and stated that he did not have permission to assist local police with the murder investigation.

Because Smith cannot demonstrate that he was unavoidably prevented from discovering the *Touhy* regulations or that the State suppressed Rozier’s alleged violation of those regulations, the common pleas court did not abuse its discretion by denying his Crim.R. 33(B) motion for leave to file a new-trial motion without an evidentiary hearing.

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Lastly, while the common pleas court should not have discussed the merits of the new-trial motion without first finding that Smith had been unavoidably prevented from discovering the evidence upon which his new-trial motion relies, Smith has not shown any prejudicial error resulting from this action. *See* App.R. 12(D). The denial of Smith's Crim.R. 33(B) motion was not based on the merits of his new-trial motion, but on the determination that the newly discovered evidence—the *Touhy* regulations—were available and discoverable at the time of his trial.

Accordingly, Smith's two assignments of error are overruled, and the judgment of the common pleas court is affirmed.

The court further orders that 1) a copy of this Judgment constitutes the mandate, 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

**BOCK, P.J.**, and **MOORE, J.**, concur.

**To the clerk:**

**Enter upon the journal of the court on 12/11/2025 per order of the court.**

By:   
Administrative Judge