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

STATE OF OHIO,	:	APPEAL NO. C-260033 TRIAL NO. B-1602484-B
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY*
KIRMAREY ELLINGTON,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, and the briefs.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is affirmed.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 9/30/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By: Jennifer Hensley
Administrative Judge

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STATE OF OHIO,	:	APPEAL NO. C-260033 TRIAL NO. B-1602484-B
Plaintiff-Appellee,	:	
vs.	:	
KIRMAREY ELLINGTON,	:	*O P I N I O N*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 30, 2026

Connie Pillich, Hamilton County Prosecuting Attorney, and *Scott Heenan,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Kirmarey Ellington, pro se.

BOCK, Judge.

{¶1} Defendant-appellant Kirmarey Ellington appeals the common pleas court's judgment denying his delayed motion for a new trial. Because Ellington did not first seek and obtain leave to file his delayed motion for a new trial as required by Crim.R. 33(B), we must affirm the trial court's judgment.

I. Factual and Procedural History

{¶2} In May 2017, a jury found Ellington guilty of aggravated burglary, two counts of aggravated robbery, accompanying gun specifications, and having a weapon while under a disability, all arising from a home invasion. The primary issue at trial was Ellington's identity. One of the victims, who arrived home while the burglary was in progress, testified that the intruder looked familiar. The victim checked his stepson's Facebook page, saw a photograph of Ellington, and identified Ellington as the intruder. Two other victims also identified Ellington at trial. This court affirmed Ellington's convictions on appeal. *See State v. Ellington*, 2018 Ohio App. LEXIS 4082 (1st Dist. Sept. 19, 2018).

{¶3} Eight years after his trial, Ellington moved for a new trial based on newly discovered evidence. In his motion, he asserted that the police investigation into the burglary had originated from a rumor attributed to "Dontez Hollis's little brother." Ellington argued that the State suppressed the identity of that person at trial, effectively preventing Ellington from confronting this "hearsay declarant."

{¶4} Ellington also cited to Crim.R. 33(B) and contended that he "satisfies Criminal Rule 33(B) because he was unavoidably prevented from discovering the identity of the hearsay declarant until January 2025" when he learned of it through a friend. Ellington attached this friend's affidavit, wherein she attests she only learned in January 2025 that Ellington was unaware of the hearsay declarant's identity.

Because she was familiar with Hollis's family, she informed Ellington of his name.

{¶5} In response to his motion, the State argued that Ellington had failed to move separately for leave, that his claims were barred by res judicata, and, even if not barred, the newly discovered evidence would not have affected the outcome of the trial.

{¶6} The trial court summarily denied Ellington's motion for a new trial. Ellington appeals, raising five assignments of error, which we address out of order.

II. Analysis

{¶7} In his third assignment of error, Ellington contends that "[t]he trial court erred in finding the Motion for New Trial untimely without determining whether [Ellington] was unavoidably prevented from discovering the new evidence as required by Crim.R. 33(B)." Under this assignment, Ellington generally argues that the trial court erred by denying his delayed motion for a new trial. We disagree.

1. The trial court properly denied the delayed new-trial motion

{¶8} Crim.R. 33 governs motions for new trial. We review a trial court's ruling on a Crim.R. 33(A) motion for a new trial and Crim.R. 33(B) motion for leave to file a new-trial motion for an abuse of discretion. *State v. McAlpin*, 2026-Ohio-148, ¶ 14, citing *State v. McNeal*, 2022-Ohio-2703, ¶ 13. "A court exercising its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority" constitutes an abuse of discretion. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. Courts lack the discretion to make errors of law. *Id.* at ¶ 39.

{¶9} A defendant must file a new-trial motion based on newly discovered evidence within 120 days after the jury's verdict, unless the defendant offers "clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely" within that period. Crim.R. 33(B).

{¶10} Recently, the Ohio Supreme Court reaffirmed that a defendant seeking

to file an untimely motion for a new trial must follow Crim.R. 33(B)'s two-step process. *McAlpin* at ¶ 16. First, the defendant must "*obtain* an order from the trial court" finding that the defendant was unavoidably prevented from discovering the evidence within the 120-day period. (Emphasis added.) *Id.* (collecting cases), citing Crim.R. 33(B). Second, after obtaining leave, the defendant must file the new-trial motion within seven days of the court's order. *Id.* at ¶ 18. Thus, an untimely motion for a new trial is not properly before the trial court unless the defendant first obtains leave to file it. *Id.* at ¶ 17-18.

{¶11} Here, there is no dispute that Ellington filed his motion for a new trial after the 120-day period had expired. But Ellington failed to first obtain leave of court to file his delayed motion. Because Ellington failed to comply with the mandatory procedure set forth in Crim.R. 33(B), his motion was not properly before the court. *Id.* at ¶ 23. In *McAlpin*, the Ohio Supreme Court expressly held that "[a] defendant's failure to *obtain* leave to file an untimely motion for a new trial is a sufficient reason to affirm a trial court's denial of a motion for new trial." (Emphasis added.) *McAlpin*, 2026-Ohio-148, at ¶ 23, citing *State v. Norman*, 2005-Ohio-5087, ¶ 8 (10th Dist.). Accordingly, regardless of the merits of Ellington's claimed grounds for a new trial, the trial court properly denied the motion.

{¶12} Ellington argues that he did seek leave to file his delayed new-trial motion because, within the body of his motion, he asserted that he had been unavoidably prevented from discovering the name of the hearsay declarant, that he had "satisfied" Crim.R. 33(B), and that his motion for a new trial was timely. He contends that the trial court therefore should have considered his Crim.R. 33(B) argument before denying his motion on the merits.

{¶13} The Sixth District recently considered a similar matter in *State v. Quinn*,

2026-Ohio-2578 (6th Dist.). There, Quinn raised unavoidable prevention in his delayed motion for a new trial, but he had not first sought or obtained leave to file the motion. The Sixth District concluded that Quinn had failed to comply with the first step of Crim.R. 33(B)'s mandatory two-step process because he had not obtained leave before filing his new-trial motion.

{¶14} The circumstances are materially the same here. Like the defendant in *Quinn*, Ellington raised the issue of unavoidable prevention in his motion for a new trial, but he did not first *obtain* leave to file that motion. Merely asserting within the new-trial motion that he was unavoidably prevented from discovering the evidence does not satisfy Crim.R. 33(B)'s requirement that a defendant first obtain an order granting leave to file an untimely motion.

{¶15} *McAlpin* supports this conclusion. In that case, McAlpin filed his delayed motion for a new trial in August 2019. Six months later, in February 2020, he filed a motion for leave to file a new-trial motion and a separate supplemental motion for a new trial. McAlpin argued that, because the motions were pending at the same time, the trial court should have ruled on his motion for leave before denying the August 2019 motion for a new trial. The Supreme Court rejected that argument, explaining that even if the February 2020 motion for leave were construed as applying to the August 2019 motion, the trial court still properly denied the August 2019 motion because McAlpin had not obtained leave before filing it, as required by Crim.R. 33(B). *McAlpin*, 2026-Ohio-148, at ¶ 23.

{¶16} Accordingly, following *McAlpin* and *Quinn*, we hold that because Ellington did not first obtain leave to file his untimely new-trial motion, he failed to comply with Crim.R. 33(B)'s mandatory two-step procedure. The trial court therefore properly denied his delayed motion for a new trial. Ellington's third assignment of

error is overruled.

{¶17} Although *McAlpin* makes clear that a defendant must obtain leave before filing an untimely motion for a new trial, its discussion also suggests the proper sequencing of the filings: the defendant should first file a motion for leave under Crim.R. 33(B). Then, once the trial court enters an order granting leave, the defendant must file the new-trial motion within seven days of that order.

2. Remaining assignments are moot

{¶18} Because Ellington's first, second, fourth, and fifth assignments of error address the merits of his new-trial motion, they are moot based on our resolution of his third assignment of error. Accordingly, we do not address the remaining assignments of error.

III. Conclusion

{¶19} Having overruled the third assignment of error and finding the remaining assignments moot, we affirm the trial court's judgment.

Judgment affirmed.

ZAYAS, P.J., and **CROUSE, J.,** concur.