

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

STATE OF OHIO,	:	APPEAL NO. C-090097
	:	TRIAL NO. B-0308628-A
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
BRYANT R. GAINES,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 12, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

William Gallagher and *Arenstein & Gallagher*, for Defendant-Appellant.

Karla M. Hall, *U.C. College of Law*, *Ohio Innocence Project*, for Defendant-Appellant.

Please note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Bryant R. Gaines appeals the Hamilton County Common Pleas Court’s judgment overruling his Crim.R. 33 motion for a new trial. We reverse the judgment upon our determination that the court erred in declining to conduct an evidentiary hearing on the motion.

{¶2} Gaines was convicted in 2004 upon a jury verdict finding him guilty of murder. He appealed his conviction, and we affirmed.¹ Gaines also unsuccessfully challenged his conviction in an R.C. 2953.21 petition for postconviction relief² and in two successive Crim.R. 33 motions for a new trial. He appeals here the trial court’s judgment overruling the second of his new-trial motions. And he presents on appeal two assignments of error.

I. Evidentiary Hearing

{¶3} We address first, and sustain, Gaines’s second assignment of error, challenging the overruling of his new-trial motion without an evidentiary hearing.

{¶4} Gaines submitted his new-trial motion under Crim.R. 33(A)(6). The rule permits a trial court to grant a new trial 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.”³ The rule plainly contemplates a hearing on the motion.⁴ But it does not mandate an evidentiary hearing.⁵ Instead, the decision

¹ *State v. Gaines*, 1st Dist. Nos. C-040122 and C-040139, 2005-Ohio-3032.

² *State v. Gaines* (June 14, 2006), 1st Dist. No. C-050409.

³ Crim.R. 33(A)(6).

⁴ See Crim.R. 33(A)(6) (requiring the defendant to “produce at the hearing on the motion * * * the affidavits of the witnesses by whom such evidence is expected to be given” and permitting the state to “produce affidavits or other evidence to impeach the affidavits of such witnesses”); see, also, *State v. Howard* (June 25, 1986), 1st Dist. No. C-850755; *State v. Broady* (1974), 41 Ohio App.2d 17, 23-24, 321 N.E.2d 890.

⁵ See *State v. Mincy*, 1st Dist. No. C-060041, 2007-Ohio-1316, ¶16; *Howard*, *supra*.

whether to conduct an evidentiary hearing depends on the circumstances and is committed to the sound discretion of the trial court.⁶

The Trial

{¶5} Gaines was charged with murder in connection with the shooting death of Clarence Eugene Bradshaw on September 6, 2003. That afternoon, during a picnic at Janara Tucker’s apartment building, Lonnell Dickey and his brother, Charles Jackson, argued with Bradshaw’s cousin after he had nearly run into Dickey’s car in the building’s parking lot. The ensuing verbal altercation escalated to threats, was soon joined by Bradshaw and others, simmered over the course of the day, and ended with Bradshaw’s death.

{¶6} At trial, Bradshaw’s 16-year-old half-brother, Brandon Mincy, provided the only eyewitness account of the murder, and he implicated his cousin, Gaines. Bradshaw had provided financially for Mincy’s family and had served as a father figure to Mincy. On the night of Bradshaw’s murder, shortly before midnight, Mincy and Bradshaw stood talking on the front porch of Bradshaw’s residence when they saw Gaines and two men whom Mincy did not recognize mount the steps of Tucker’s building next door. Gaines entered the building, while the other two men remained on the steps. Bradshaw instructed Mincy to stay on the porch while he walked next door to “say, what’s up, to them.” Mincy nevertheless trailed behind. As Bradshaw approached the steps, Mincy saw one of the men, whom he later identified as Dickey, fire two shots. He then saw Gaines emerge from the building and, from the landing, fire a single shot. Bradshaw fell to the ground, and Dickey came down

⁶ See *State v. Austin*, 1st Dist. No. C-010486, 2002-Ohio-2293, ¶8; *Howard*, supra; *Broadly*, 41 Ohio App.2d at 23-24.

the steps and shot Bradshaw once in the head at close range. The three men then “jog[ged]” down the street.

{¶7} Mincy’s 17-year-old brother, Lionel Mincy, testified at trial that he had been walking away from the buildings when he heard gunshots. He hid behind a car, saw Bradshaw fall, saw Dickey shoot Bradshaw in the head, and saw Gaines flee with Dickey and a third man. Lionel Mincy also stated that, during the preceding summer, he had seen Gaines in possession of a .45-caliber handgun.

{¶8} The boys’ father, Lonnie Mincy, testified that he had been sitting in his home six doors down, when he heard the gunshots. He ran toward the sound. His sons intercepted him, and Brandon told him that Gaines and another man had shot Bradshaw. Lonnie Mincy admitted, and his sister and Gaines’s mother, Judy Mincy, confirmed, that their relationship had been contentious since Lonnie Mincy had lost their legal battle over custody of their infirm father and control over his finances.

{¶9} The autopsy showed that Bradshaw had sustained two gunshot wounds each to his head, his abdomen, and his upper arm. One head wound was a contact wound. The bullet that caused the other head wound also perforated the cervical spinal cord and brain stem and likely caused Bradshaw’s death.

{¶10} The police recovered two .380 shell casings and one .45-caliber shell casing near the apartment building’s steps. And the coroner recovered a .45-caliber bullet from Bradshaw’s abdomen.

{¶11} Statements by Brandon and Lionel Mincy led the police to Gaines. Brandon Mincy testified at trial that Gaines had been wearing jeans and a white T-shirt that night. Crime-lab testing of jeans, a white T-shirt, and shoes that Gaines

had been wearing approximately ten hours later, when he was taken into police custody, revealed the presence of gunshot residue.

{¶12} In his statement to police and in his testimony at trial, Gaines insisted that he had been in Tucker's first-floor apartment, talking to his friend and Tucker's boyfriend, Ronald Rawls, when Bradshaw was shot. In Gaines's version of the night's events, he heard the shots, looked out the apartment window, and saw the victim prone on the walkway leading to the building. Gaines did not recognize the victim as his cousin, Bradshaw. Bradshaw, Gaines asserted, had had a reputation for violence involving guns and had earlier that day brandished a handgun. Fearing that Bradshaw was now the one doing the shooting, Gaines and Rawls left the building five to ten minutes later and proceeded across the street to where their friend Shawn Hawkins stood. Gaines then continued on foot alone to his mother's home, leaving his car, which had tended to stall, parked in front of the building.

{¶13} The next morning, Gaines learned from a relative that Bradshaw had been killed, and that he was a suspect in the shooting. Gaines testified that he had not dressed in the new clothes he had worn the night before, but had dressed in blue jeans, a white T-shirt, and shoes that he had worn and then had left at his mother's home earlier in the week. The gunshot residue on those clothes, he asserted, came from his test-firing of a nine-millimeter handgun he had purchased for his mother for protection and, at her insistence, had sold a few days before the murder. He denied owning a gun at the time of Bradshaw's murder and denied ever owning a .45-caliber handgun.

{¶14} One of Tucker's sisters testified that she had not seen Gaines in the apartment or at the door when she heard the shots. A second sister testified that, as she was leaving the apartment building shortly before the shooting, she had seen

Dickey and Jackson, but not Gaines, in the first-floor hallway. Dickey was putting on rubber gloves, and Jackson was concealing under his shirt what appeared to her to be a gun. She returned to the apartment to warn those inside. As she was again leaving the building, she again passed Dickey and Jackson, and as she was descending the outside stairs, she passed Gaines, who had just emerged from his car.

{¶15} Tucker and Rawls testified that, immediately before the shooting, Gaines had knocked on Tucker's apartment door and had asked Tucker if he could speak with Rawls. As Rawls approached the doorway where Gaines waited, gunshots rang out. Gaines promptly left the apartment, and Rawls followed. Tucker locked the door behind them and called for emergency assistance. Two minutes later, she heard Lionel Mincy shout to his father that "they" had shot Bradshaw. Gaines and Rawls crossed the street, spoke for a few minutes with Shawn Hawkins, and then went their separate ways.

The Affidavits

{¶16} In his new-trial motion, Gaines asserted, as he had maintained at trial, that he did not shoot Bradshaw. He supported his new-trial motion with the affidavits of (1) Lonnel Dickey, exonerating Gaines in the murder, (2) bystander Gregory M. Carter, implicating Lonnel Dickey and Dickey's brother, Charles Jackson, in the murder, and (3) Brandon Mincy, recanting his trial testimony implicating Gaines.

{¶17} In his 2004 affidavit, Lonnel Dickey averred that Gaines "didn't have anything to do with the shooting of Mr. Bradshaw." Dickey insisted that Gaines had been inside the apartment building, and that he alone had shot Bradshaw. He stated that he had drawn his gun when Bradshaw had confronted him with a gun, that he had shot Bradshaw in the torso, and that, when his gun "jam[med]," he had drawn

his “.380” and shot Bradshaw again. As he was driving away, Dickey saw Gaines and Rawls emerge from the apartment building, and he told them, “I sho[]t him.”

{¶18} Gregory M. Carter averred in his 2008 affidavit that he had lived across the street from Tucker’s apartment building in September 2003. On the afternoon of September 6, Carter, who was “familiar with” Dickey, Jackson, Rawls, and Gaines, saw the four men on the building’s front steps. That night, at about 11:30 p.m., as Carter was walking from his home to his car, he saw his “friend” Bradshaw walking toward Tucker’s apartment building and called to him. Bradshaw told Carter to “[h]old on a minute” and continued toward the building’s entrance. Carter saw only Dickey and Jackson on the building’s porch and saw one of the men fire at Bradshaw from the porch. The two men then approached Bradshaw, Jackson shot Bradshaw in the back, and Dickey shot the now-prone Bradshaw in the head. In all, Carter asserted, the pair fired four shots from two handguns. Dickey and Jackson then drove away. Approximately ten minutes later, as Bradshaw lay on the ground, Carter saw Gaines and Rawls emerge from the apartment building and “jog” down the street.

{¶19} Carter’s affidavit testimony was supplemented by the affidavit of a law student with the Ohio Innocence Project who had taken notes at a December 2007 meeting with Carter. The law student averred that Carter had specifically denied telling anyone about what he had seen the night of the murder until after Gaines had been convicted.

{¶20} In two affidavits, one made in 2007 and the other made in 2008, Brandon Mincy averred that his trial testimony had been “inaccurate,” and that he had not seen Gaines shoot Bradshaw. Mincy explained that he had implicated Gaines at trial because he had been “upset and angry” at Gaines “for not helping * * *

Bradshaw,” but instead “running away.” Mincy stated that, while standing on Bradshaw’s porch, he had seen Gaines enter Tucker’s apartment building and had then seen Dickey and Jackson mount the stairs to the building. As instructed by Bradshaw, Mincy remained on the porch as Bradshaw approached Dickey and Jackson. Mincy heard Bradshaw’s exchange with Gregory Carter, then followed Bradshaw and “witnessed [his] murder.” Mincy further stated that, during a conversation with Dickey in 2006, while both men were confined in the same correctional institution, Dickey had confirmed that he, with a “.38 special,” and Jackson, with a “.45 caliber,” had shot Bradshaw, and that Gaines had not been involved. But Dickey refused Mincy’s demand that Dickey “come forward about his brother, [Jackson],” and he threatened “to go to war over it” if necessary.

The Hearing

{¶21} At the hearing on the new-trial motion, the trial court denied the defense’s motions to permit Gaines and Brandon Mincy to appear. The court then heard arguments on the new-trial motion and rejected the defense’s request to call Carter to testify. The court granted the request of the assistant prosecuting attorney who had prosecuted Gaines to speak on behalf of the state, and the court solicited, over defense counsel’s objection, his opinion concerning the credibility of Brandon Mincy’s trial testimony.

{¶22} Before the hearing, the state had moved to dismiss the new-trial motion. In its motion to dismiss, the state cited “exhibits” that allegedly supported its argument that Gregory Carter’s affidavit was not “truthful.” Those “exhibits” purportedly included a summary of Carter’s criminal history, a transcript of an interview with Carter, a transcript of an interview with Carter’s ex-wife contradicting Carter’s affidavit, and a “statement” by Gaines’s mother concerning the truthfulness

of Brandon Mincy's affidavits. But the state did not attach its "exhibits" to its motion. And it did not offer its "exhibits" into evidence at the hearing.⁷ Consequently, the state's "exhibits" are not a part of the record before us on appeal.

{¶23} Nevertheless, at the new-trial hearing, the common pleas court queried counsel, and permitted argument, concerning matters allegedly disclosed in the state's "exhibits." The court's inquiry into the substance of the state's "exhibits" prompted defense counsel to again request that the court permit the affiants to testify at the hearing so that the affiants might respond to the court's questions. The court again declined counsel's request.

{¶24} Following the hearing, the court overruled the state's motion to dismiss the new-trial motion to the extent of the state's challenge to the new-trial motion's timeliness. But the court overruled the new-trial motion on its merits. The court discounted the credibility of Brandon Mincy's affidavits upon its determination that his trial testimony had been the "most credible." And the court concluded that if a new trial were granted, Carter's testimony would not be outcome-determinative.

The Calhoun Factors

{¶25} The Ohio Supreme Court in *State v. Calhour*⁸ set forth factors for a common pleas court to consider in assessing the credibility of affidavits submitted in support of, and thus in determining the need for an evidentiary hearing on, an R.C. 2953.21 petition for postconviction relief. The common pleas court must accord the affidavits "due deference." But the court "may, in the sound exercise of discretion, judge their credibility" and "may, under appropriate circumstances * * * , deem affidavit testimony to lack credibility without first observing or examining the

⁷ See Crim.R. 33(A)(6) (permitting the state to "produce affidavits or other evidence to impeach the affidavits of [defense] witnesses").

⁸ 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

affiant.”⁹ In determining whether, in a “so-called paper hearing,” to “accept * * * affidavits as true statements of fact,”¹⁰ or to instead discount their credibility, the common pleas court must consider “all relevant factors,” including “(1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner’s efforts, * * * (5) whether the affidavits contradict evidence proffered by the defense at trial,” (6) whether the affidavits are “contradicted by” the trial testimony of the affiants, and (7) whether the affidavits are “internally inconsistent.”¹¹

{¶26} The supreme court declared that the *Calhoun* analysis was “supported by common sense” and advanced “the interests of eliminating delay and unnecessary expense[] and furthering the expeditious administration of justice.” Those same interests would be served by applying the *Calhoun* factors to assess the credibility of affidavits submitted in support of, and thus to determine the need for an evidentiary hearing on, a Crim.R. 33(A)(6) new-trial motion. We, therefore, join those appellate districts that have adopted the *Calhoun* analysis for that purpose.¹²

The Credibility of Mincy’s Affidavit was Improperly Discounted

{¶27} In support of his 2005 postconviction petition, Gaines had offered Dickey’s affidavit, along with an affidavit made by Shawn Hawkins. In affirming the

⁹ Id. at 284.

¹⁰ Id.

¹¹ Id. at 284-285.

¹² See, e.g., *State v. Thornton*, 12th Dist. No. CA2008-10-092, 2009-Ohio-3685, ¶60; *State v. Taylor*, 8th Dist. No. 88020, 2007-Ohio-825, ¶15-17; *State v. Beavers*, 166 Ohio App.3d 605, 2006-Ohio-1128, 852 N.E.2d 754, ¶20-21, citing *State v. Coleman*, 2nd Dist. Nos. 04CA43 and 04CA44, 2005-Ohio-3874, ¶25-27.

common pleas court's denial of the petition, we applied the *Calhoun* factors to hold that the court did not abuse its discretion in discounting the credibility of the affidavits. We considered the fact that the judge who reviewed Gaines's postconviction petition had also presided at his trial, that Dickey and Hawkins were Gaines's friends, that Hawkins's averments exonerating Gaines were not demonstrably based on his firsthand observations, and that Dickey had risked nothing in taking sole responsibility for the shooting because he had already pled guilty to and been sentenced for the crime.¹³

{¶28} In overruling Gaines's new-trial motion, the court below did not, as it could not, discount the credibility of Gregory Carter's affidavit. The language and form of the affidavits submitted in support of the motion did not suggest that the affidavits had been prepared by the same person. The judge who reviewed Gaines's new-trial motion had not also presided at his trial. Carter's affidavit was internally consistent, did not conflict in any material respect with the evidence offered by the defense at trial, and did not rely on or contain hearsay. And Carter had no apparent interest in Gaines securing a new trial. Although Carter was "familiar" with Gaines, their relationship was not demonstrably different from Carter's relationship with Dickey or Jackson, whom Carter implicated in Bradshaw's murder. And because Carter and Bradshaw had been friends, Carter's interest would logically be consistent with punishing Bradshaw's killer, not freeing Gaines.

{¶29} But the court expressly discounted the credibility of Brandon Mincy's affidavits. And we conclude that the court, in doing so, abused its discretion.

{¶30} Again, the judge who reviewed Gaines's new-trial motion had not also presided at his trial. And the court's solicitation of the assistant prosecuting attorney's opinion concerning Mincy's credibility at trial was not an acceptable

¹³ See *State v. Gaines* (June 14, 2006), 1st Dist. No. C-050409.

substitute for the experience of actually witnessing Mincy's trial testimony. Mincy's affidavits were internally consistent, they did not conflict in any material respect with the evidence offered by the defense at trial, and they conflicted with Mincy's trial testimony only to the extent that they exonerated, rather than implicated, Gaines in the shooting. Mincy's 2008 affidavit contained hearsay, but only to the extent that it was offered to prove that Jackson had shot Bradshaw. Mincy had no apparent interest in Gaines securing a new trial. Mincy and Gaines are cousins, but their family relationship was demonstrably strained and was not as strong as Mincy's relationship with his half-brother Bradshaw. And in recanting his trial testimony, Mincy risked prosecution for perjury. We, therefore, conclude that the common pleas court abused its discretion in discounting the credibility of Mincy's affidavits.

An Evidentiary Hearing Was Warranted

{¶31} And we conclude that Gaines supported his new-trial motion with evidence demonstrating substantive grounds for relief.¹⁴ To prevail on a Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence, the movant must demonstrate that the evidence “(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.”¹⁵ A new-trial motion is directed to the sound discretion of the trial court, and the court's decision will not be reversed on appeal in an absence of an abuse of that discretion.¹⁶

¹⁴ See *Calhoun*, 86 Ohio St.3d at 289.

¹⁵ *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

¹⁶ See *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus.

{¶32} In declining to dismiss Gaines’s new-trial motion as untimely, the common pleas court effectively, and properly, found that Carter’s affidavit “ha[d] been discovered since the trial,” and “could not in the exercise of due diligence have been discovered before the trial.”¹⁷ But the court overruled Gaines’s new-trial motion upon its conclusions that Brandon Mincy’s affidavits exonerating Gaines were “of no value,” that his trial testimony had been the “most credible,” and that Carter’s eyewitness testimony exonerating Gaines, being in conflict with Mincy’s “credible” trial testimony, would not, in a new trial, be outcome-determinative.

{¶33} Brandon Mincy had provided at trial the only eyewitness testimony to the shooting, and he had implicated Gaines. Carter’s affidavit provided a second eyewitness account, and he exculpated Gaines. Thus, Carter’s evidence was not “merely cumulative” of the evidence presented at trial.

{¶34} Moreover, Carter’s affidavit was indisputably material to the ultimate issue of Gaines’s guilt. As such, it could not be said to “merely impeach or contradict” the trial evidence.

{¶35} Finally, as we determined *supra*, Mincy’s affidavits recanting his trial testimony could not, for purposes of a “paper hearing[],”¹⁸ be discounted and thus must be “accepted * * * as true statements of fact.”¹⁹ Consequently, on the state of the record before us, Carter’s affidavit exonerating Gaines in the shooting must be said to disclose a strong probability of a different result if a new trial were granted.

{¶36} Because Gaines supported his new-trial motion with evidence demonstrating substantive grounds for relief, the common pleas court, in deciding

¹⁷ See *Petro*, syllabus.

¹⁸ *Calhoun*, 86 Ohio St.3d at 285.

¹⁹ *Id.* at 284.

Gaines's new-trial motion without an evidentiary hearing, abused its discretion.²⁰
We, therefore, sustain the second assignment of error.

II. The First Assignment of Error is Moot

{¶37} Our disposition of Gaines's second assignment of error renders moot his first assignment of error, challenging the overruling of the new-trial motion on its merits. We, therefore, do not reach the merits of the first assignment of error.

III. We Reverse

{¶38} Upon our determination that the common pleas court abused its discretion in deciding Gaines's new-trial motion without an evidentiary hearing, we reverse the court's judgment and remand for further proceedings consistent with the law and this decision.

Judgment reversed and cause remanded.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this decision.

²⁰ See *Calhoun*, 86 Ohio St.3d at 289.