[Cite as *State v. Parks*, 2018-Ohio-3975.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES M. PARKS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0027

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2003-CR-227

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Robert L. Herron, Prosecutor, *Atty. Alec A. Beech*, Assistant Prosecutor, Columbiana County Prosecutors Office, 105 South Market Street, Lisbon, Ohio 44432 for Plaintiff-Appellee and

James M. Parks, *pro se,* #463-038, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430 for Defendant-Appellant.

Dated: September 21, 2018

Robb, P.J.

{¶1} Defendant-Appellant James M. Parks appeals the decision of the Columbiana County Common Pleas Court on his motion for leave to file a motion for a new trial on the basis of newly discovered evidence. Before his motion for leave was addressed, Appellant filed the motion for a new trial. The trial court found Appellant's motion untimely and also without merit. Appellant failed to show by clear and convincing evidence that he was unavoidably prevented from the discovery of the evidence upon which he relies. For instance, his attorney was provided with the two interviews of the child-victim in 2004. In addition, Appellant unreasonably delayed the filing of his 2017 motion for leave after admittedly obtaining copies of the evidence in 2008. For these and the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On August 1, 2003, Appellant was indicted in Columbiana County for one count of rape using force or threat of force against a child under ten years of age. The bill of particulars alleged he forced an eight-year-old child to perform fellatio on him on May 5, 2003. On that day, a witness followed fresh tire tracks into a field he was patrolling for his landlord and discovered Appellant's truck backed up to the tree line. (Tr. 157-159). He coasted his truck down a slight incline toward the driver's side door of Appellant's truck until he was very close. (Tr. 160-161). Appellant was in the driver's seat, and the witness opined Appellant did not notice his approach until after he stopped his vehicle. The witness saw Appellant pull up his pants as a young blond haired boy (estimated to be seven or eight years old) lifted his head up from Appellant's lap. (Tr. 162-163). The child's head had been turned down. (Tr. 179). Appellant accelerated out of the field as the witness tried to stop him from fleeing. (Tr. 164). The witness called the police. He happened to see Appellant's vehicle the next day at which time he obtained the license plate number. He identified Appellant at trial. (Tr. 168-169).

{¶3} Appellant admitted to a detective that he was in the field with a child, who had blond hair and was lying across the seat of his truck, when a farmer drove his truck within a foot of his driver's side door. (Tr. 70, 75). However, Appellant claimed the child

was his three-year-old daughter who had been sleeping. (Tr. 71). When asked why his pants would have been down, he initially said his pants may have fallen down because he did not wear a belt. (Tr. 72). After a break in the interview for the detective to check on the daughter, Appellant said his pants were down because he had been urinating when the witness pulled up. (Tr. 74).

{¶4} The witness in the field insisted the child he saw in Appellant's truck was a boy (aged seven or eight) and not a three-year-old girl. (Tr. 63). The man who was taking care of Appellant's daughter at the time of the interview later disclosed he had an eight-year-old grandson with blond hair who idolized Appellant. (Tr. 78). This victim's father testified his child went to his grandparents' house after school on May 5, 2003. When he arrived to retrieve his child, the child was not there as he had been picked up by Appellant who brought him home in the evening. (Tr. 200-201). When the child arrived at home, he wanted to go straight to bed. (Tr. 202). After speaking to the detective, the child's father and girlfriend asked the child if anyone ever did anything inappropriate to him. (Tr. 184). Upon the child's response, the detective was called to the house to hear the child's disclosure. (Ct. Ex. B, June 13, 2003 Interview). The child was interviewed again at the Child Advocacy Center. (Ct. Ex. C, June 25, 2003 Interview).

{¶5} At the February 2004 trial, the child was approximately 9.5 years old and in second grade. The court inquired into his competency before he testified. (Tr. 148-153). When the court opined the child was competent to testify, the defense had no objection. (Tr. 153). The child spoke of the day he was in Appellant's truck in a field when a man drove up and Appellant drove away. (Tr. 229-230). Appellant pulled the child's pants and his own pants down. (Tr. 231). The child testified Appellant's penis entered his mouth and Appellant made him do this by pushing his head down. (Tr. 231-232).

{¶6} Over the state's objection, the court provided the June 13 and 25, 2003 interviews to the defense for use in cross-examination of the child. (Tr. 241, 247). This was in response to the defendant's motion for in camera inspection of prior recorded statements of the child to the detective per former Crim.R. 16(B)(1)(g). Pursuant to this rule, on completion of a witness's direct examination, the court on motion of the defendant shall conduct an in camera inspection of the statement with defense counsel

and the prosecutor to determine the existence of inconsistencies. Crim.R. 16(B)(1)(g). "If the court determines inconsistences exist, the statement shall be given to the defense attorney for use in the cross examination of the witness as to the inconsistencies." *Id.* If the court does not find inconsistencies, the statement shall not be given to the defense and may not be commented upon; although, it shall be preserved in the record for review in case of an appeal. *Id.*

{¶7} As to the June 13, 2003 interview, defense counsel cited page 10 and quoted a question and response, where the child answered in the negative when asked whether Appellant ever had the child do anything to him. (Tr. 238). There was a discussion about how the statement was in the context of other offenses at other times, such as anal penetration, and how the child also immediately stated without further prompting that Appellant made him touch Appellant's penis. (Tr. 239).[1] Upon providing the child's two interviews to the defense, the court also noted the child's grand jury testimony was not inconsistent and would not be provided but would be preserved for the record as Court Exhibit A. (Tr. 236, 241-242). Thereafter, in cross-examining the child, defense counsel attempted to show the child had been coached.

{¶8} After trial, the court memorialized its decision on the child's prior recorded statements in the February 6, 2004 judgment entry which recited the jury verdict finding Appellant guilty as charged. In a March 4, 2004 judgment entry, Appellant was sentenced to life in prison and labeled a sexual predator.

{¶9} In the direct appeal of his conviction, Appellant was represented by new counsel. The record on appeal included the Court Exhibits A, B, and C. (Docket 11/4/04). On appeal, Appellant raised issues with: competency of the child and allegations of coaching; ineffective assistance of counsel by failing to object to the competency determination, failing to seek to suppress the victim's testimony, failing to ask a witness a certain question, and failing to seek a particular jury instruction; and the detective's hearsay statement. In overruling the arguments on competency and coaching, we reviewed the competency hearing and the contested portions of the trial transcript. On December 23, 2005, this court affirmed Appellant conviction. *State v.*

[1] Six counts of rape of the same victim were brought in Carroll County where Appellant pled guilty. *See State v. Parks*, 7th Dist. No. 04 CA803, 2005-Ohio-6926.

Parks, 7th Dist. No. 04 CO 19, 2005-Ohio-6926. After that decision, Appellant filed a motion to unseal various parts of the record.

{¶10} Although Appellant did not appeal the trial court's mid-trial decision about the disclosure of the grand jury transcript, he filed a post-trial motion in 2006 seeking grand jury testimony, which was denied by the trial court. He filed other post-conviction motions that were denied as well. On June 19, 2017, Appellant filed the within motion for leave to file a motion for new trial based on newly discovered evidence.

{¶11} The motion for leave urged Appellant was unavoidably prevented from discovering new evidence which he identified as the supplemental exhibits filed under seal. Without referring to the particulars of the information within the exhibits, Appellant stated the evidence disclosed a strong probability the result would change if a new trial was granted and claimed it was not utilized at trial or available for his direct appeal because the exhibits were sealed and he was not given access to them within the 120-day period for filing a timely new trial motion. Appellant argued there was no requirement that he file his motion within a reasonable time of discovering the evidence as long as he showed he could not obtain it within 120 days of trial.

{¶12} Appellant's motion for leave alternatively claimed the 2017 motion was filed within a reasonable time of receiving the evidence, which he claimed occurred in 2008. He said the evidence was issued to him on July 28, 2008 as a result of a federal court order and received by him on July 30, 2008. He said he could not obtain the evidence until the district court for the Northern District of Ohio granted his request for the records in his pro se habeas proceeding, after which he proceeded with the evidence in federal district court and appealed to the circuit court instead of simultaneously utilizing the evidence in a motion for leave in state court.[2]

{¶13} Without waiting for a ruling on the motion for leave, Appellant separately filed a motion for a new trial. He cited to the cross-examination of the child at trial and pointed to indications of coaching. He stated the competency hearing reviewed on appeal consisted of minimal questioning. Appellant then reviewed the two interviews of

[2] His motion claimed his appellate attorney attempted to obtain the evidence. The docket from the direct appeal shows counsel asked for permission to review the sealed competency hearing, and this court granted permission. Appellant's affidavit attached to his motion said he unsuccessfully requested the trial court to provide him with a copy of the sealed records. He did not say when this request occurred. Although he sought grand jury testimony in a 2006 post-trial motion, this motion did not ask for the other two court exhibits, the interviews which were provided to defense counsel at trial.

the child for evidence the child was not competent, was asked leading questions, and was coached, citing portions where the child was reluctant to volunteer information or answered in the negative but subsequently answered in the positive. Appellant's motion pointed out the child did not mention in his interviews conduct constituting fellatio (where anal penetration and touching were described). Appellant's motion did not mention the grand jury transcript.[3]

{¶14} On August 2, 2017, the state filed a memorandum in opposition to the motion for leave to file a motion for new trial. The state urged the motion was untimely as there was no showing Appellant was unavoidably prevented from discovering the evidence. It was also pointed out Appellant admitted he had the evidence nearly 9 years before filing his motion for leave and his delay in seeking leave was unreasonable. The state suggested the motion for a new trial was premature and subject to dismissal as leave had not been granted. The state alternatively argued the motion for new trial should be denied as there was not a strong probability the result of trial would be different, noting: the child testified to fellatio in open court and was subject to aggressive cross-examination; a witness saw the child raise his head from Appellant's lap while Appellant's pants were down; and Appellant admitted to being in his truck in the field with his pants down when the witness approached him while a child was lying across the seat of his truck.

{¶15} On August 9, 2017, the trial court issued judgment denying Appellant's motion. The court reviewed Appellant's argument on being unavoidably prevented from discovering his evidence within 120 days of trial and the state's argument that he possessed the evidence since at least 2008. The court found the motion was untimely and without merit. The court also declared the motion was denied for the reasons in the state's memorandum in opposition. The within appeal followed.

MOTION FOR NEW TRIAL AND MOTION FOR LEAVE

{¶16} A new trial may be granted on the defendant's motion if his substantial rights are materially affected due to the discovery of new evidence material to the defense which the defendant could not with reasonable diligence have discovered and

[3] This motion does not review the grand jury transcript where the child stated Appellant did not make him put his mouth on his penis but then immediately said Appellant touched the child's mouth with his penis when the witness caught them in the field. (G.J. Tr. 6-7).

produced at the trial. Crim.R. 33(A)(6). In order to grant a new trial motion based on newly discovered evidence, the defendant must show the new 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. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993), applying *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. A motion for a new trial is reviewed under the abuse of discretion standard of review. *State v. Schiebel*, 55 Ohio St.3d 71, 76, 564 N.E.2d 54 (1990).

{¶17} A motion for new trial based upon newly discovered evidence shall be filed within 120 days after the verdict was rendered. Crim.R. 33(B). A defendant seeking to file a motion for new trial after this deadline must seek leave to do so from the trial court. We also review a motion for leave to file a motion for new trial under an abuse of discretion standard. *State v. Mundt*, 7th Dist. No. 17 NO 0446, 2017-Ohio-7771, ¶ 5.

{¶18} Pursuant to Crim.R. 33(B), "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," the defendant shall file his motion within seven days after the trial court finds he was unavoidably prevented from discovering the evidence within the 120-day period. Therefore, the defendant has the burden to prove by clear and convincing evidence that he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Rodriguez–Baron*, 7th Dist. No. 12-MA-44, 2012-Ohio-5360, ¶ 11. "[D]efendants and their trial counsel have a duty to make a 'serious effort' of their own to discover potential favorable evidence." *State v. Golden*, 10th Dist. No. 09AP-1004, 2010-Ohio-4438, ¶ 15 (defendant was not unavoidably prevented from discovering witness's statement to police).

{¶19} "Clear and convincing evidence" is a measure of proof that will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Schiebel*, 55 Ohio St.3d at 74, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). It is an intermediate measure or degree of proof which is less than the certainty required where the burden of proof is "beyond a reasonable doubt" but more than a mere "preponderance of the evidence." *Id.*

ASSIGNMENTS OF ERROR

{¶20} Appellant sets forth two assignments of error which contend:

"TRIAL COURT ERRED AND DENIED APPELLANT DUE PROCESS OF LAW UNDER THE OHIO AND U.S. CONSTITUTIONS WHEN HE WAS DENIED A HEARING ON HIS MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL PURSUANT TO CRIM.R. 33."

"THE TRIAL COURT ERRED IN PREMATURELY DENYING APPELLANT'S MOTION FOR NEW TRIAL, OR, ERRED IN DENYING THE MOTION FOR NEW TRIAL IN LIGHT OF THE FACT THAT THE EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL COURT PROCEEDINGS."

{¶21} Initially, Appellant complains the trial court rendered its decision seven days after the state responded to his motion without waiting for his reply which was filed within ten days of the state's memorandum in opposition. As to his motion for leave, Appellant's reply argued the state was incorrect in asserting a reasonable time standard applied to the filing of the motion after obtaining newly discovered evidence. He also noted he filed his motion for a new trial without waiting for a ruling on his motion for leave in order to ensure he did not miss the seven-day deadline for filing the new trial motion if the trial court granted his motion for leave. He then made arguments replying to the state's arguments as to the merits of the new trial motion.

{¶22} First, we note the argument in Appellant's reply relevant to the motion for leave (that there was no reasonable time standard) was already set forth in his motion for leave. Next, we note a post-trial motion "shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority * * *." Crim.R. 47. This rule also states, "To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition" with no mention of a reply. More specifically, the rule setting forth the particular parameters of the proceedings involved in seeking a new trial does not provide for a reply. *See* Crim.R. 33.

{¶23} Finally, there is no citation to a local rule granting the right to file a reply to a response to a motion. *Compare State v. Warren*, 2d Dist. No. 26112, 2015-Ohio-36, ¶ 5, 15 (where the trial court overruled a motion for leave to file a new trial motion before

the time for a reply expired under a local rule which gave ten days to reply). In fact, Columbiana County Local Rule 1.1(B) provides: "All non-emergency Motions shall be decided on and after 14 days from the date of filing without oral hearing, unless otherwise ordered by the Court." Upon the June 19, 2017 filing of Appellant's motion for leave, a notice was issued stating the motion for leave would be decided on the briefs on July 11, 2017, noting any response must be timely filed. A subsequent judgment entry noted the temporary absence of the prosecutor and granted the state until August 2, 2017 to respond, and the state did respond by said date. Therefore, no provision granted Appellant the right to file a reply to the state's response to his motion.

{¶24} Next, Appellant relies on the following statement: "A defendant is entitled to a hearing on his motion for leave if he submits documents that on their face support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *State v. Grissom*, 2d Dist. No. 26626, 2016-Ohio-961, ¶ 18 (upholding the denial of leave as the defendant did not establish he lacked knowledge of the existence of the ground supporting his motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence). *See also State v. Barnes*, 5th Dist. No. CT2017-0092, 2018-Ohio-1585, ¶ 36-38 (finding the trial court did not abuse its discretion in denying the motion for leave without a hearing because the evidence, on its face, did not support the appellant's claims that he was unavoidably prevented from timely discovery of the evidence). To show he was unavoidably prevented from filing a motion for new trial, Appellant was required to show he "had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Kozic*, 7th Dist. No. 16 MA 0158, 2017-Ohio-4391, ¶ 7.

{¶25} Appellant's brief contends the interviews of the child were sealed and not available before the direct appeal or before the 120-day deadline for filing a new trial motion without leave. His brief also mentions receiving the competency hearing transcript at the same time. As to the competency hearing transcript, competency was addressed on appeal. The sealed portion of the trial transcript containing the competency hearing was made available by this court for preparation of Appellant's

brief in the direct appeal and cited in our opinion affirming Appellant's conviction. *See Parks*, 7th Dist. No. 04 CO 19 at ¶ 5-11. The competency hearing transcript is not what Appellant relied upon as the newly discovered grounds for new trial in any event.

{¶26} Regarding the interviews of the child, these were provided to defense counsel at trial, and he was granted permission to use them during cross-examination of the child. The issue Appellant raises now on coaching and the child's answers during the interviews was discussed by the parties on the record at trial. The trial court made the interview transcripts part of the record, and they were filed in this court in the direct appeal. The trial court decided not to disclose the grand jury transcript at the time it disclosed the interviews. However, the trial court made the child's grand jury testimony part of the record for appeal. Any issue with non-disclosure of the grand jury transcript was not raised on appeal. In any event, it is cumulative of Appellant's other evidence showing the child's reluctance to speak, and it then contains testimony about Appellant touching his penis to the child's mouth (which is what Appellant emphasizes as being absent from the interviews of the child).

{¶27} Accordingly and considering the record of this case, the documents do not on their face show Appellant was unavoidably prevented from discovering the evidence that he claims is newly discovered. The core evidence relied upon in Appellant's brief (and in his motion for new trial) was the transcribed interviews, and these were provided to the defense at trial.

{¶28} Additionally, the state correctly argued and the trial court properly agreed that Appellant's motion was not filed within a reasonable time of July 2008, when Appellant claims to have finally obtained all of the sealed evidence as a result of a federal court order. "A trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the new evidence." *State v. Kimbrough*, 8th Dist. No. 84863, 2005-Ohio-1320, ¶ 14 (filing motion for new trial more than three years after discovering evidence was not reasonable). Therefore, even assuming arguendo a defendant meets his burden of establishing by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within the 120-day time limit, the trial court can consider the circumstances and exercise its discretion to determine if the delay in filing was unreasonable. *Id.*; *State v. Clark*, 2d Dist. No. 26596, 2016-Ohio-39, ¶ 28-31; *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959,

¶ 20; *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 37; *State v. Griffith*, 11th Dist. No.2005-T-0038, 2006-Ohio-2935, ¶ 15; *State v. Barnes*, 12th Dist. No. CA 99-06057 (Dec. 30, 1999). *See also State v. Stansberry*, 8th Dist. No. 71004 (Oct. 9, 1997) (without a reasonableness standard, a defendant could wait to file the motion in hopes a witness or evidence becomes unavailable).

{¶29} Appellant cites a Fourth District case stating there should be no reasonableness requirement for filing a motion for leave to file a motion for new trial as long as the defendant proves he was unavoidably prevented from discovering his evidence within the 120-day period. *See State v. Pinkerman*, 88 Ohio App.3d 158, 623 N.E.2d 643 (4th Dist.1993). However, the majority of appellate districts reject this theory, and the Fourth District has since departed from that precedent. *State v. Seal*, 4th Dist. No. 16CA14, 2017-Ohio-116, 75 N.E.3d 1035, ¶ 12-15, appeal not allowed, 149 Ohio St.3d 1433, 2017-Ohio-4396, 76 N.E.3d 1209.

{¶30} In any event, this court has adopted the position that the motion must be filed within a reasonable time of discovering the evidence. In *Wilson*, this court stated, even if we were to assume arguendo the defendant provided clear and convincing proof he was unavoidably prevented from discovering new evidence on who was the shooter, the defendant could not overcome the issue concerning his delay between discovering the evidence and filing the motion for leave to file a new trial motion. *State v. Wilson*, 7th Dist. No. 11 MA 92, 2012-Ohio-1505, ¶ 57-58 (where the defendant waited over three years from obtaining the alleged key affidavit to file a motion for leave to file a new trial motion). "While Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence. * * * We agree with this rule and adopt it." *Id.* at ¶ 57. Consequently, although the rule does not specify a time limit for filing upon discovering new evidence after the 120-day deadline, a trial court in the exercise of its discretion can require a defendant to file within a reasonable time of the discovery.

{¶31} There is no indication the trial court abused its discretion here. Appellant admittedly waited nearly nine years after receiving copies of the sealed evidence (upon a federal court order) to file his motion for leave to file a motion for a new trial. He urges he was reasonably proceeding with the evidence in the federal courts. However,

parallel proceedings need not be considered a valid reason to wait to file a motion for leave to file a motion for new trial based on newly discovered evidence. In addition, Appellant states the Sixth Circuit disposed of his case in November 2013 and offers no explanation as to why he waited until June 2017 to file his motion for leave to file a motion for new trial in state court. *See Parks v. Bobby*, 545 Fed.Appx. 478 (6th Cir.2013), affirming N.D.Ohio No. 4:07CV03592 (Aug. 9, 2011) (overruling objections, adopting magistrate judge's report, and dismissing habeas petition).

{¶32} In making his final argument, Appellant notes the trial court's ruling appears to have also denied his motion for new trial, which he decided to file without waiting for a ruling on his motion for leave. He states a trial court must grant leave before issuing a ruling on the merits, without recognizing courts are able to make alternative holdings to cover all bases in support of a ruling and/or in case one ruling is reversed on appeal. In arguing the merits of his motion for new trial, Appellant emphasizes that the child did not refer to oral sex in the two interviews. With this evidence, he believes there exists a strong probability the outcome of his trial would have been different. The state argues the victim testified to fellatio clearly on direct examination and was subject to vigorous cross-examination including accusations of coaching. In any event and as aforementioned, the interview evidence was available for use at trial and was not newly discovered. *See* Crim.R. 33(A)(6) (a new trial may be granted on the defendant's motion if his substantial rights are materially affected due to the discovery of new evidence material to the defense which the defendant could not with reasonable diligence have discovered and produced at the trial).

{¶33} Regardless, any ruling on the merits of his motion for a new trial was made in the alternative and is moot, considering that he was not unavoidably prevented from discovering the evidence and he waited an unreasonably long time to file his motion after receiving the evidence. *See, e.g., State v. McNeill*, 9th Dist. No. 15CA010774, 2016-Ohio-5463, ¶ 4, 13 (where the trial court denied the motion for leave and alternatively denied the motion for new trial, the appellate court affirmed the denial of leave and overruled as moot the assignment of error addressing the merits of the motion for a new trial); *State v. Anderson*, 10th Dist. No. 12AP-133, 2012-Ohio-4733, ¶ 6, 13, 19-20 (where the trial court overruled the motion for leave but nevertheless addressed and overruled the arguments in his motion for new trial, the appellate court

noted that in the absence of an order granting leave, the trial court had no obligation to determine the merits of the motion for a new trial and thus the assignments of error addressing the merits of the motion were moot).

{¶34} For all of the foregoing reasons, Appellant's assignments of error are overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.