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

STATE OF OHIO,	:	APPEAL NO. C-100294 TRIAL NO. B-0707191-A
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
ROGER SMITH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Defendant-appellant Roger Smith presents on appeal two assignments of error challenging the Hamilton County Common Pleas Court's judgment overruling his motion for a new trial without a hearing. We affirm the court's judgment as modified.

Smith was convicted in 2008 upon jury verdicts finding him guilty of two counts of murder. In his direct appeal, we vacated his sentences and remanded for resentencing consistent with R.C. 2941.25. But we affirmed the judgment of conviction in all other respects,[2] and we subsequently affirmed the judgment entered upon resentencing.[3]

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
[2] See *State v. Smith*, 1st Dist. No. C-080685, 2009-Ohio-6932, appeal not accepted for review, 123 Ohio St.3d 1472, 2009-Ohio-5704, 915 N.E.2d 1254; .
[3] See *State v. Smith* (June 23, 2010), 1st Dist. No. C-090677.

In February 2010, while his appeal from his resentencing was pending before this court, Smith filed with the common pleas court a Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence. The court overruled the motion, and this appeal followed.

A Crim.R. 33(A)(6) new-trial motion may be filed either by right, within 120 days of the return of a verdict, or by leave of court, "within seven days from an order of the court finding that [the movant had been] unavoidably prevented from discovering the evidence within the [120-]day period."[4] A Crim.R. 33(A)(6) motion filed within 14 days after a verdict's return tolls the running of the 30-day period for filing a notice of appeal until the motion is overruled.[5]

Smith did not satisfy the rule's time restrictions. He filed his new-trial motion well after the 120-day period prescribed by the rule had expired. Smith did not seek, and thus did not obtain, leave of court to file his motion out of time. And the motion did not toll the time for appeal because he did not file it within 14 days of the return of the verdicts.

Moreover, Smith's direct appeal to this court from his resentencing divested the common pleas court of jurisdiction to entertain his new-trial motion.[6] And he did not ask this court to remand the case to the common pleas court for a ruling on the motion.

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[4] Crim.R. 33(B).
[5] See id.; App.R. 4(A) and 4(B)(3).
[6] See *In re Kurtzhalz* (1943), 141 Ohio St. 432, 48 N.E.2d 657, paragraph two of the syllabus; accord *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207; *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162.

Finally, a trial court retains jurisdiction to correct a void judgment.[7] But the ground for relief advanced in Smith's new-trial motion, even if demonstrated, would not have rendered his judgment of conviction void.

Therefore, the common pleas court had no jurisdiction to entertain Smith's new-trial motion, and the motion was subject to dismissal without a hearing.[8] Accordingly, we overrule the assignments of error. Upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect a dismissal of the motion. And we affirm the judgment as modified.

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

CUNNINGHAM, P.J., HENDON and **MALLORY, JJ**.

To the Clerk:

Enter upon the Journal of the Court on December 3, 2010

per order of the Court _____.

Presiding Judge

[7] See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.

[8] See *State v. Lemker* (Mar. 23, 2001), 1st Dist. No. C-990331.