

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

STATE OF OHIO,	:	APPEAL NO. C-150173
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-1006545
vs.	:	<i>JUDGMENT ENTRY.</i>
MARIO TROLLINGER,	:	
Defendant-Petitioner-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-petitioner-appellant Mario Trollinger appeals from the Hamilton County Common Pleas Court's judgments denying the relief sought in his postconviction petition and in his motion for a new trial. We affirm the court's judgments.

Trollinger was convicted in 2011 upon jury verdicts finding him guilty of murder, aggravated robbery, and having weapons under a disability. His convictions were affirmed in direct appeals to this court and the Ohio Supreme Court. *State v. Trollinger*, 1st Dist. Hamilton No. C-110340, 2013 Ohio App. LEXIS 2113 (May 30, 2012), *appeal not allowed*, 133 Ohio St.3d 1413, 2012-Ohio-4650, 975 N.E.2d 1030. And the common pleas court denied him the relief sought in his 2012 petition under R.C. 2953.21 et seq. for postconviction relief and in his Crim.R. 33 motion for a new trial, filed in 2013.

We overrule the first assignment of error, challenging the denial of postconviction relief. Trollinger's postconviction claim that his trial counsel was ineffective in failing to investigate or to present at trial the exculpatory testimony of Donisha Horne was not

supported by outside evidence demonstrating that counsel could have learned of and secured Horne's testimony, but through a lack of diligence, had failed to do so. See *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). And neither his claim of prosecutorial misconduct, based on an alleged attempt to suborn perjury, nor his claim of actual innocence, based on a key prosecution witness's alleged recantation, provided a substantive ground for postconviction relief, because neither claim demonstrated a constitutional violation in the proceedings resulting in Trollinger's convictions. See R.C. 2953.21(A)(1)(a); *State v. Powell*, 90 Ohio App.3d 260, 264, 629 N.E.2d 13 (1st Dist.1993) (holding that R.C. 2953.21(A) requires a showing that the constitutional violation upon which a postconviction petitioner's right to relief rests occurred "in the proceedings that actually resulted in [his] conviction," and that an actual-innocence claim based on newly discovered evidence will not provide a ground for postconviction relief). Because Trollinger failed to sustain his burden of submitting evidentiary material setting forth sufficient operative facts demonstrating substantive grounds for relief, the common pleas court properly denied his postconviction petition without an evidentiary hearing. See R.C. 2953.21(C); *State v. Pankey*, 68 Ohio St.2d 58, 428 N.E.2d 413 (1981); *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980).

We also overrule the second assignment of error, challenging the overruling of Trollinger's Crim.R. 33 motion for a new trial. Trollinger sought a new trial under Crim.R. 33(A)(1), (2), (4), and (6), nearly two years after the verdicts had been returned in his case. A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence must be filed either within 120 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted. And a motion for a new trial on grounds other than newly discovered evidence must be filed either within 14 days of

the return of the verdict or within seven days after leave has been granted. Crim.R. 33(B).

Leave to move for a new trial out of time is discretionary with the court. When the ground advanced is newly discovered evidence, leave may be granted only upon “clear and convincing proof that the defendant [had been] unavoidably prevented from [timely] discovering the evidence.” With any other ground, leave may be granted only upon “clear and convincing proof that the defendant [had been] unavoidably prevented from [timely] filing [his new-trial] motion.” Crim.R. 33(B).

Trollinger did not timely move for a new trial. Nor did he move for leave to file his new-trial motion out of time. And the record does not otherwise demonstrate unavoidable prevention. Therefore, we cannot say that the common pleas court abused its discretion in denying Trollinger a new trial.

Accordingly, we affirm the court’s judgments.

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.

**DEWINE, P.J., MOCK and STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on March 16, 2016

per order of the court \_\_\_\_\_.

Presiding Judge