

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

STATE OF OHIO,	:	APPEAL NO. C-160828
Plaintiff-Appellee,	:	TRIAL NO. B-0900896
vs.	:	<i>JUDGMENT ENTRY.</i>
REGINALD GRIFFIN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Reginald Griffin appeals the Hamilton County Common Pleas Court's judgment overruling his Crim.R. 33(B) motion for leave to file a motion for a new trial. We affirm the court's judgment.

In 2010, Griffin was convicted, following a bench trial, of felonious assault and having weapons while under a disability. We affirmed his convictions in his direct appeal. *State v. Griffin*, 1st Dist. Hamilton No. C-100068 (Feb. 11, 2011), *appeals not accepted*, 128 Ohio St.3d 1503, 2011-Ohio-2420, 947 N.E.2d 684.

In 2016, Griffin filed with the common pleas court a Crim.R. 33(B) motion, seeking leave to file out of time a motion for a new trial under Crim.R. 33(A)(2), on the ground of witness misconduct, and under Crim.R. 33(A)(6), on the ground of newly discovered evidence. In this appeal, he advances three assignments of error, challenging the overruling of his motion for leave without an evidentiary hearing or a statement of

the court's reasons for denying leave. We address the assignments of error together, and we overrule them upon our determination that leave was properly denied.

We note that Griffin's proposed grounds for a new trial depended for their resolution upon evidence outside the record of the proceedings leading to his convictions. Accordingly, he could not have raised those matters in the direct appeal of his convictions. And our decision on direct appeal affirming those convictions would not have deprived the common pleas court of jurisdiction to entertain a motion for a new trial on those grounds if leave to file a new-trial motion had been appropriate. *See State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 34 and 37.

But we conclude that the common pleas court properly overruled Griffin's motion for leave to move for a new trial. On his motion for leave, Griffin bore the burden of proving by clear and convincing evidence that he had been "unavoidably prevented" from timely discovering, and from timely presenting in a new-trial motion, the evidence upon which his new-trial motion depended. *See* Crim.R. 33(B); *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, ¶ 32. The court's decision concerning leave may not be overturned on appeal if it was supported by some competent and credible evidence. *Schiebel* at 74; *State v. Mathis*, 134 Ohio App.3d 77, 79, 730 N.E.2d 410 (1st Dist.1999), *rev'd in part on other grounds*, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912, ¶ 20 (1st Dist.).

Crim.R. 33(B) does not, as Griffin suggests, require the court to issue findings of fact and conclusions of law when denying leave to file a new-trial motion. *See State ex rel. Collins v. Pokorny*, 86 Ohio St.3d 70, 711 N.E.2d 683 (1999); *State v. Elliott*, 1st Dist. Hamilton No. C-020736, 2003-Ohio-4962, ¶ 11 (holding that Crim.R. 33 does not require findings of fact and conclusions of law when overruling a new-trial motion). But

the rule plainly contemplates a hearing. The nature of that hearing is discretionary with the court and depends on the circumstances, and the court must conduct an evidentiary hearing if the evidence offered in support of the motion demonstrates unavoidable prevention. *See Carusone* at ¶ 4 and 33; *State v. Gaines*, 1st Dist. Hamilton No. C-090097, 2010-Ohio-895, ¶ 4.

Implicit in the common pleas court's decision denying Griffin's motion for leave is the court's conclusion that Griffin failed to sustain his burden of demonstrating unavoidable prevention. The record supports that conclusion, when it is devoid of evidence concerning any efforts, during the six years between Griffin's convictions and the filing of his motion for leave, to discover the outside evidence supporting his new-trial motion. Therefore, the court neither abused its discretion in declining to conduct a hearing, nor erred in denying Griffin leave to file a new-trial motion out of time.

Accordingly, we affirm the court's judgment.

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., MYERS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on December 20, 2017
per order of the court _____.

Presiding Judge