

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

STATE OF OHIO,	:	APPEAL NO. C-210330
	:	TRIAL NO. B-1204674
Plaintiff-Appellee,	:	
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
IAN MILLER	:	
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.

In a single assignment of error, defendant-appellant Ian Miller challenges the Hamilton County Common Pleas Court’s judgment denying, without a hearing, his Crim.R. 33(B) motion for leave to move for a new trial. For the following reasons, we affirm the trial court’s judgment.

In 2014, Miller was convicted of murder in the shooting death of the boyfriend of his child’s mother. He unsuccessfully challenged his conviction on direct appeal and in a postconviction motion filed in 2019. *State v. Miller*, 1st Dist. Hamilton No. C-140101 (May 22, 2015); *State v. Miller*, 1st Dist. Hamilton No. C-180199 (June 13, 2019).

In 2021, Miller filed a motion seeking leave to file a new-trial motion out of time under Crim.R. 33(A)(6), based on “newly discovered evidence.” In support of

his motion, he proposed to offer evidence in the form of media reports about factually similar shootings by police in 2014 in Butler County, Ohio, and in 2018 in Sacramento, California, for which the shooters were not charged. The common pleas court denied leave upon its determination that the motion was not timely filed and did not contain newly discovered evidence material to Miller's defense.

Crim.R. 33(A)(6) provides that a new trial may be granted 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 the trial." We explained in *State v. Carusone* that Crim.R. 33 "contemplates a bifurcated proceeding when a motion for a new trial on the ground of newly discovered evidence is filed more than 120 [days] after the return of the verdict." *State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, ¶ 31. First, the trial court must review the motion for leave and associated evidence to determine whether the defendant proved by clear and convincing evidence that he was "unavoidably prevented" from "timely discovering, and from timely presenting in a new-trial motion, the evidence upon which his new-trial motion depends." *Id.* at ¶ 31-32. If, and only if, the court finds that the defendant satisfies the "unavoidable prevention" standard, the defendant has seven days to file the motion for a new trial. *Id.*

Courts will generally conduct an evidentiary hearing on the issue of leave if the motion for leave is supported "with evidentiary material that, on its face, demonstrates unavoidable prevention." *Id.* at ¶ 33. However, if the new-trial motion is "meritless," the court does not need to grant an evidentiary hearing. *State v. Hill*, 1st Dist. Hamilton No. C-180114, 2019-Ohio-365, ¶ 70.

While Crim.R. 33 cases often involve issues of both unavoidable prevention (worthy of a hearing) and "newly discovered evidence" (worthy of leave), here we

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have neither. Miller has neither supported his motion with evidence of unavoidable prevention, nor has he provided any “newly discovered evidence.” The “newly discovered evidence” that Miller offered in support of his new-trial motion is not evidence. Rather, it consists of unauthenticated news reports that do not relate to the facts of his case and are not material to his defense. The common pleas court correctly found that, like newly announced court decisions, news reports concerning incidents similar to Miller’s are not the type of evidence contemplated by Crim.R. 33. *See State v. Rodano*, 8th Dist. Cuyahoga No. 107880, 2019-Ohio-2117, ¶ 7, citing *State v. Ingram*, 10th Dist. Franklin No. 08AP-937, 2009-Ohio-2755, ¶ 15 (“None of the grounds [of Crim.R. 33] specifically addresses a subsequent Supreme Court case setting forth a new constitutional principal, rule or right.”).

Because the material Miller sought to introduce was not the type of evidence contemplated under Crim.R. 33, we overrule the assignment of error and affirm the court’s judgment.

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

MYERS, P.J., CROUSE and BERGERON, JJ.

To the clerk:

Enter upon the journal of the court on November 24, 2021,

per order of the court _____.
Administrative Judge