Order

Michigan Supreme Court
Lansing, Michigan

December 4, 2018

Stephen J. Markman,
Chief Justice

157894 & (16)

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157894
COA: 341130
Wayne CC: 91-004698-FC

ZEBADIAH HOLLAND,
Defendant-Appellant.

_____/

On order of the Court, the motion to amend the application for leave to appeal is GRANTED. The application for leave to appeal the April 26, 2018 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 4, 2018

Clerk

a1126

Court of Appeals, State of Michigan

ORDER

People of MI v Zebadiah Holland

Docket No. 341130

LC No. 91-004698-01-FC

Christopher M. Murray
Presiding Judge

Kirsten Frank Kelly

Thomas C. Cameron
Judges

The Court orders that the motion to waive fees is GRANTED.

The delayed application for leave to appeal is DISMISSED. Defendant has failed to demonstrate his entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G).

The motion for evidentiary hearing is DISMISSED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 26 2018

Date

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Chief Clerk

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

Hon. James R. Chylinski
Case # 91-0044698

-vs-

ZEBADIAH HOLLAND
Defendant,
_____/

ORDER DENYING DEFENDANT'S 3rd SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT

At a session held in Frank Murphy Hall of Justice

On OCT 13 2017

PRESENT: HON. JAMES R. CHYLINSKI
CIRCUIT COURT JUDGE

On August 30, 1991, defendant, Zebadiah Holland, was convicted by a jury for the crime of First-degree murder, **MCL 750.316; MSA 28.548**, Breaking and Entering, **MCL 750.110; MSA 28.305** and Felony Firearm, **MCL 750.227b; MSA 28.424(2).** On September 18, 1991, defendant was sentenced to "LIFE" in prison for the murder conviction, ten to fifteen years for breaking and entering, and a consecutive two-year sentence for felony firearm. On August 9, 1994, Michigan's Court of Appeals vacated defendant's conviction and sentence for breaking and entering, but affirmed

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defendant's murder and firearm convictions and sentences. On July 28, 1995, defendant's delayed application for leave to appeal to Michigan's Supreme Court was dismissed. On August 19, 1999, this Court denied defendant's motion for relief from judgment. On November 29, 1999, Michigan's Court of Appeals dismissed defendant's application for leave to appeal. On February 13, 2008, this Court denied defendant's 2nd motion for relief from judgment. Defendant has since exhausted all of his state and appellate remedies.

Defendant now files a 3rd successive Motion for Relief from Judgment. **MCR 6.502(G)(1)** states that after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. A subsequent motion may filed if there is a retroactive change in the law that occurred after the first motion or a claim of newly discovered evidence that was not discovered before the first such motion. **MCR 6.502 (G)(2).**

Defendant presents as new evidence an affidavit, from Bernard Howard, and a statement collected from Danny Patterson defendant purports are material to his innocence. Patterson in his statement claims Patricia Craig, "she called me Friday morning about 8am, and she said that Kiba and Leon killed Charles for nothing. There wasn't no dope there, and there was only $ 0.86 cents and that was hers." Defendant claims this statement could have been used to impeach Ms. Craig during his trial, and the concealment of this statement constitutes a *Brady* violation. Defendant claims he

satisfies **MCR 6.502(G)** because he did not discover this evidence prior to his previous motion. Further, defendant claims he is entitled to a new trial based on newly discovered evidence that completely exonerates him and implicates the real perpetrators. However, defendant's only issue that putatively survives **6.502(G)** scrutiny is his newly discovered evidence issue. The remaining issues are not found to be meritorious, as there is no established good cause for why these issues weren't raised previously, nor do they pertain to new evidence, a retroactive change in the law, or jurisdictional exceptions to **MCR 6.502**. Defendant's remaining issues are also denied because he has raised them before, in an appeal or post-conviction motion which was previously denied, and he is precluded from re-litigating them again in a subsequent motion or appeal. **MCR 6.508(D).**

This Court has long held that a new trial may be granted on the basis of newly discovered evidence and has applied the same four-part test for ruling on such motions for over a century. *Canfield v. City of Jackson,* 112 Mich. 120, 123, 70 NW 444 (1897); *People v. Johnson,* 451 Mich. 115, 118; 545 NW2d 637 (1996). This test was most recently reaffirmed in *Cress,* which held that a motion for a new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. *People v. Cress,* 468 Mich

678, 664 NW2d 174 (2003); *People v. Barbara,* 400 Mich 352, 362-363, 255 NW2d 171 (1977); *People v. Williams,* 77 Mich App 119, 131, 258 NW2d 68 (1977).

However, it is equally well established that "motions for relief from judgment based upon the issue of newly-discovered evidence are looked upon with disfavor, and the cases where Michigan's Supreme Court have held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." *Webert v. Maser,* 247 Mich. 245, 246, 225 NW 635 (1929). The rationales underlying this proposition are apparent. "A motion for a new trial, upon the ground of newly-discovered evidence, is not regarded with favor ... [because] [t]he policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence." *Canfield,supra* at 123 (quotation marks and citation omitted) "Such applications are entertained with reluctance and granted with caution because of the manifest injustice in allowing a party to allege that which may be the consequence of his or her own neglect in order to defeat an adverse verdict." *People v Rao,* 491 Mich 271, 279–80; 815 NW2d 105, 111 (2012).

> "[E]vidence is newly discovered if it can be shown to have been unknown to the defendant or his counsel at the time of trial." Indeed, because "[o]ne does not 'discover' evidence after trial that one was aware of prior to trial," this is the only reasonable understanding of "newly discovered evidence." *People v. Terrell,* 289 Mich App 553, 563, 797 NW2d 684 (2010) (emphasis, quotation marks, and citation omitted). "To hold otherwise stretches the meaning of the word 'discover' beyond its common understanding. *Webster's Third New Int'l Dictionary* 647 (2002) (defining 'discover' as 'to make known (something secret, hidden, unknown, or previously unnoticed)')." *Id.* (quotation marks and citation omitted).

Further, Michigan courts have held that a defendant's awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been "unavailable" at the time of trial. This rule has been applied in various circumstances giving rise to the evidence's claimed "unavailability." In *People v. Purman,* 216 Mich 438–439, 185 NW 725, Michigan's Supreme Court explained that a "new trial will not be granted because of newly-discovered evidence where the witness who was to give it was known to the accused, although he could not be found at the time of the trial, where no continuance or postponement was requested."

Consequently, this Court has determined that defendant's documentary evidence is not new, although defendant did not obtain Howard's affidavit until 2017, the dates on the police statement from Danny Patterson is dated April 17, 1991, and the affidavit from Bernard Howard was created twenty-six years after defendant's conviction, and Howard's statement is rife with hearsay, and gathered from an otherwise unavailable source. Moreover, Mr. Patterson's police statement also incriminates defendant, as the person who contacted the witness, Patricia Craig, and tried to get her to leave town, rather than testify at defendant and his co-defendants' with the promise of securing her a bus ticket.[1] Patterson also identifies co-defendants, Leon Lippett and Bekeiba Holland as the perpetrators of the crime. Finally, within the

[1] Defendant's Exhibit "B", page 2.

Homicide Scene Investigation Report, the investigating officers indicate that "Low"[2] was identified by Ms. Craig by his freckled face and voice. Ms. Craig, also stated that defendant and his brother are always together, and both brothers "hang with" Leon and Marvin Lippett.[3] Thus, this Court holds the statement by Mr. Patterson is not new evidence, as it was available prior to defendant's trial. Moreover, Mr. Howard's affidavit is simply not trustworthy, as he is conveying a conversation he had with another person twenty-six years ago; he is not testifying to any facts from his personal knowledge. *Cress, supra.* As this Court has determined that defendant's evidence does not meet the threshold of new evidence, his successive motion for relief from judgment is **DENIED**.

DATED: OCT 13 2017

CIRCUIT COURT JUDGE

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on OCT [illegible] 17

Name

[2] A/k/a Bekeiba Holland, defendant's brother
[3] Defendant's Exhibit "C", page 4.

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