

STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. ARO-23-450

STATE OF MAINE
APPELLEE

v.

PEDRO J. ROSARIO
APPELLANT

ON APPEAL FROM UNIFIED CRIMINAL COURT, AROOSTOOK COUNTY

**** BRIEF OF APPELLEE ****

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I. STATEMENT OF THE CASE

Pedro Rosario (hereafter Appellant) was charge and ultimately indicted for a single count of Aggravated Trafficking of Scheduled Drugs (fentanyl) on March 12, 2020. (A. 21) The matter proceeded to jury selection on May 13, 2021. (Ex. 1, *generally*) During Appellant's jury selection, Juror 23 was identified as a juror Appellant wanted to voir dire, but that voir dire never occurred and Juror 23 was selected as an alternate juror. (A. 17) Neither Appellant nor the State had any objection to the jury as selected and the jury as selected was satisfactory to both Appellant and the State. (Ex. 1, 175:17-24)

Appellant's trial occurred over June 1st through 3rd of 2021 and concluded with the jury's determination of Appellant's guilt. (A. 7) Prior to the commencement of jury deliberations the trial court released Jurors 172 and 258, mistaking Juror 172 as an alternate juror. (A. 17) The trial court attributed that mistake to the seating plan.¹ (A. 17)

On June 14, 2021, jury selection was held utilizing the same jury pool and Juror 23 was included. (A. 17) During the June 14, 2021 jury selection day, Juror 23 indicated that (1) he was acquainted with the District Attorney for Aroostook

¹ The trial court noted this was one of the first trials conducted during COVID. The jury seating plan diagram depicts a jury box (Ex. 4), but this jury had been seated in what otherwise would have been the public gallery of the Superior Court in Houlton in order to leave adequate spacing between each juror.

County (Todd Collins) through high school; (2) had spoken with Collins much since high school; and (3) would nonetheless be able to be fair and impartial. (Ex 3, 36:24-25, 37:1, 38:14-22)

On April 21, 2023, less than two years following Appellant's conviction, Appellant filed a motion for new trial identifying newly discovered evidence as the sole basis for that motion. (A. 22-25) The motion identified the above-described information learned about Juror 23 during the June 14, 2021 jury selection event as that newly discovered evidence. (A. 22-23) Appellee did not dispute any of the *factual* allegations contained in Appellant's motion for new trial. (A. 17) Those factual allegations along with (1) portions of Appellant's jury selection proceeding (Exhibit 1); (2) portions of Appellant's trial proceedings (Exhibit 2); (3) portions of the June 14, 2021 jury selection proceedings (Exhibit 3); and (4) a copy of the seating chart from Appellant's trial were considered as evidence at a non-testimonial hearing held on October 13, 2023. (A. 16)

On this record, the trial court denied Appellant's motion for new trial by order dated October 24, 2023. (A. 16-20) The trial court dispensed with the issues raised in Appellant's motion concluding that "what Rosario raises as newly discovered evidence is not evidence, but rather non-evidentiary irregularities that occurred during trial, particularly with respect to Juror 23." (A. 18) After having addressed the issue Appellant raised related to newly discovered evidence, the trial

court addressed the issue of whether the circumstances related to Juror 23 nonetheless justified a new trial “in the interest of justice” and determined they did not because there was no evidence that Juror 23 was impaired in any way. (A. 19-20)

II. ISSUE

Whether the trial court abused its discretion when it denied Appellant’s Motion for New Trial

III. SUMMARY OF THE ARGUMENT

The trial court correctly determined that a new trial was not warranted under the circumstances of this case. The trial court correctly determined that the issues related to Juror 23 were not newly discovered evidence. While the trial court’s determination that none of the issues related to Juror 23 implicated interests of justice warranting a new trial independent of newly discovered evidence, that consideration was unnecessary because those issues were not raised in the motion and would not have been timely if they had been.

IV. ARGUMENT

A. Standard of Review

A ruling on a motion for new trial is reviewed for abuse of discretion while the factual findings underlying that decision are reviewed for clear error. *State v. Bilodeau*, 2020 ME 92, ¶ 15, 237 A.3d 156 (“We review the trial court’s decision on a motion for a new trial for an abuse of discretion and any

findings underlying its decision for clear error.’’) (Quoting *State v. Daluz*, 2016 ME 102, ¶ 44, 143 A.3d 800).

B. Motion for New Trial Standard and Timing

Rule 33 authorizes a trial court to grant a new trial when a new trial is required by the interests of justice. Me. R. U. Crim. P. Rule 33 (“The court on motion of the defendant may grant a new trial to the defendant if required in the interest of justice.’’) The “interests of justice” require a new trial when the original trial was unfair to the defendant. *State v. Carey*, 2013 ME 83, ¶ 26, 77 A.3d 471 (“We review the denial of a motion for a new trial for clear error or an abuse of discretion, and *will only vacate a conviction when the defendant was deprived of a fair trial.*”) (Emphasis added) (Quoting *State v. Carr*, 2012 ME 136, ¶ 8, 58 A.3d 1102).

Rule 33 does not contain an exhaustive list of circumstances that would render a trial unfair and, as a discretionary ruling, the determination must necessarily be made on a case-by-case basis. The trial court may *only* consider the issue on motion of the defendant and *only* if that motion is filed within fourteen days after the verdict has been rendered subject to the single exception for when a motion is premised upon newly discovered evidence, which may be filed within two years of the date when the finding of guilty is docketed. Me. R. U. Crim. P.

Rule 33. A trial court may extend that fourteen-day time period, but only if that extension is requested and granted within that original fourteen-day window.

A motion for a new trial based on any ground other than newly discovered evidence shall be made within 14 days after verdict or finding of guilty or within such further time as the court may fix during the 14-day period. Any motion for a new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, entry of the judgment in the Unified Criminal Docket.

Me. R. U. Crim. P. Rule 33; *see also State v. Clements*, 431 A.2d 67, 69 (Me. 1981)

(“since defendant's motion for enlargement was filed, and the court's order of enlargement was made, well after expiration of the prescribed period of ten days. Hence, the only viable motion before the Superior Court, as timely filed, was defendant's motion for a new trial on the ground of newly discovered evidence.”).

The trial court’s determination that a new trial was not warranted was correct, but its treatment of “newly discovered evidence” and “interests of justice” as distinct bases upon which it could order a new trial was unnecessary. The only basis that can support the grant of a new trial are the interest of justice based upon the unfairness of the original trial to Defendant. Me. R. U. Crim. P. Rule 33 and *State v. Carey*, 2013 ME 83, ¶ 26, 77 A.3d 471. When evidence is newly discovered *after trial*, that otherwise satisfies the criteria for being “newly discovered evidence” within the meaning of Rule 33², that newly discovered

² Discussed in detail below.

evidence renders the original trial unfair to a defendant.³ Ordering a new trial because of that unfairness is in the interest of justice as required by Rule 33. They are not distinct bases for ordering a new trial and the only reason “newly discovered evidence” is explicitly referenced within the rule is because it is the only form of unfairness not subject to the fourteen-day filing requirement.

Appellant asserts that the trial court treated the motion as timely. (Blue Br. 4-5) Appellant’s motion was timely because it was filed within two years of when the conviction was entered into the docket *and because its sole basis was newly discovered evidence*. The trial court’s order addresses an issue that was not raised by the motion for reasons that are not obvious from the record, but presumably relate to arguments made at the October 13, 2023 non-testimonial hearing.

The deadline by which a motion for new trial needed to be filed was June 17, 2021, unless it was a motion for new trial based upon newly discovered evidence which would have had to be filed by August 27, 2023. This issue was raised, if it was ever raised, was raised at the October 13, 2023 non-testimonial hearing. The Motion for New Trial based upon newly discovered evidence was timely. Any bases for new trial other than newly discovered evidence should have never been considered because (1) they were not raised by motion and (2) they were not timely by any standard. The trial court had no authority to consider the

³ Unfairness does not implicate fault. A trial can be unfair to a defendant through no fault of the State.

issue, but the substantive basis for its decision was correct. *State v. Clements*, 431 A.2d 67, 69 (Me. 1981).

Appellate cites *State v. Rankin*, 666 A.2d 123, 126 n.2 (Me. 1995) in support of the proposition that a trial court has the discretion to entertain a motion for new trial based upon circumstances other than newly discovered evidence outside of the fourteen-day time period. The circumstances of *Rankin* were unique. The *Rankin* motion was filed more than fourteen-days after the verdict of guilty was rendered and no party addressed the timeliness of the motion and then *it was the Law Court not the trial court that found the motion to be timely. Id.* Although not referenced in the decision, presumably the Law Court made this finding based upon the unique circumstances of that case and pursuant to its supervisory power to preserve the integrity of the judicial system. *State v. White*, 2022 ME 54, ¶ 35, 285 A.3d 262. The circumstances of this case are not analogous to the circumstances in *Rankin* and do not warrant a similar finding of timeliness by this Law Court.

C. Newly Discovered Evidence

Appellant's motion for new trial was premised solely upon newly discovered evidence and no other basis. Appellant appears to concede that the issues related to Juror 23 were not newly discovered evidence and that the trial court's ruling on that issue was correct. (Blue Br. 4)

Evidence is “newly discovered evidence” within the meaning of Rule 33 when it is evidence that could have been presented at trial because it bears on guilt or innocence. *State v. Daly*, 2021 ME 37, ¶ 50, 254 A.3d 426 (“Newly discovered evidence is that which could have been presented at trial if it had been discovered in time, and jury deliberations, which occur after the presentation of evidence, are not probative of the elements of the charged crime or crimes.”) (citing *State v. Peaslee*, 2020 ME 105, ¶ 18, 237 A.3d 861); *see also State v. Gatcomb*, 478 A.2d 1129, 1130 (Me. 1984) (“We decline to adopt such an expansive definition of “newly discovered evidence.” Although we are aware other courts have taken a different view, it has always been our position that the kind of evidence contemplated by the rule is solely that which bears on the guilt or innocence of the accused.”) (Emphasis added).

The issues related to Juror 23 clearly have no bearing on Appellant’s guilt or innocence and could not have been presented at trial. Because this evidence is not “newly discovered evidence” within the meaning of Rule 33, it is unnecessary to analyze whether a new trial would have been warranted based upon that evidence. If the trial court had engaged in that analysis it consists of the consideration of five factors:

To succeed on a motion for a new trial based on newly discovered evidence, the defendant must establish that the new evidence (1) will probably change the result if a new trial is granted; (2) has been discovered since trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching, unless it is clear that such

impeachment would have resulted in a different verdict.

State v. Calor, 585 A.2d 1385, 1387-88 (Me. 1991). Appellant would be able to demonstrate that he discovered this evidence only after trial (2).

Appellant would have been unable to make an evidentiary showing relative to factors (1), (4), and (5) because the evidence related to Juror 23 is not evidence that would have been admitted at trial. Appellant would not be able to demonstrate that the evidence could not have been discovered before trial with reasonable diligence (3) because Appellant had an opportunity at jury selection to inquire of whether Juror 23 had any level of a relationship with any member of the District Attorney Office⁴ and during the trial to object to the discharge of the Juror 172 rather than Juror 23.⁵

D. Mistaken Discharge of Regular Juror and Replacement with Alternate Juror

The trial court's mistaken discharge of Juror 172 and replacement with Juror 23, even if amounting to an error of law, is not a basis to grant Appellant a new trial because Appellant did not move for a new trial upon that basis within fourteen days of the rendered verdict.⁶ An error of law *can be* the basis for a new trial, but

⁴ As the trial court observed, Appellant clearly intended to question Juror 23 and the court intended to facilitate that questioning, but through inadvertence of both the court and Appellant that questioning never occurred. This was a *missed opportunity* to discover that evidence prior to trial rather than a *lack of opportunity* to discover that evidence prior to trial.

⁵ Appellant knew who the alternates were because he picked the jury. It makes sense that Appellant was not closely following this issue when it happened because it really is not a material concern at the conclusion of any jury trial.

⁶ Appellant also failed to move for a new trial upon this basis within two years of when the finding of guilty was entered on the docket.

it's a basis that must be asserted close in time to the verdict or the purpose of the rule is undermined.

The use of a motion for new trial as a vehicle to raise errors of law with the presiding justice or judge shortly after trial is entirely appropriate. It gives the trial court the opportunity to respond by ordering a new trial when justice requires such a result and avoids the delay and expense of an appeal. *This function of a motion for new trial will be useful only in the time immediately after trial.* Hence, there is no point in straining the definition of newly discovered evidence in order to obtain the advantage of the two-year time limitation provided by the rule.

1 Cluchey & Seitzinger, *Maine Criminal Practice* §33.4 at VI-37 (Rev. Ed. 1992) (emphasis added). The right to move for a new trial compliments a defendant's appellate rights, but it does not substitute for them. Appellant appealed from the outcome of his trial and raised a number of issues he contended amounted to errors of law. *State v. Rosario*, 2022 ME 46, 280 A.3d 199. If Appellant were permitted to raise error of law as a basis for a new trial more than fourteen days after the entry and in fact after the conclusion of his appeal from the outcome of that trial, all of the efficiencies achieved by Rule 33 are squandered. The timing requirement of Rule 33 is intended, in part, to prevent successive appeals based upon errors of law that were not raised in the original appeal and not yet raised in the context of a petition for post-conviction review.

E. The issues related to Juror 23 did not render Appellant's trial unfair.

As articulated above, it is the unfairness of a trial that implicates the interests of justice that a new trial is predicated upon. Even if all of the procedural barriers to raising this issue at this point were removed, Appellant is still not entitled to a new trial because none of these circumstances rendered his trial unfair to him. Juror *bias* is a compelling post-trial issue, but when that concept of *bias* is qualified as *unexplored* and *potential* (Blue Br. 9) it evokes none of the same concerns.

The trial court considered the June 14, 2021 jury selection proceedings (Ex. 3) and determined that Juror 23 (1) had been voir dired regarding his historical relationship with the District Attorney Collins; (2) testified that they went to high school together; (3) testified that they had minimal contact since high school; and (4) his relationship with District Attorney Collins would not impact his ability to be fair and impartial. (A 19-20; Ex 3, 36:24-25, 37:1, 38:14-22) These circumstances do not even rise to the level of “unexplored potential bias”, let alone actual bias. The circumstance was *fully explored* and Juror 23 was determined to not be biased. This circumstance did not result in unfairness at Appellant’s trial and do not implicate interests of justice warranting a new trial.

V. CONCLUSION

For the foregoing reasons, the decision of the trial court denying Appellant’s motion for new trial must be affirmed.

April 4, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2024, I mailed two copies of Appellee's brief to Appellant's attorney, via first-class mail, at the address referenced below:

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