

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

STATE OF OHIO,	:	APPEAL NOS. C-090348
		C-090398
Plaintiff-Appellee,	:	
		TRIAL NO. B-0808268
v.	:	
LAMONT LEAR,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant Lamont Lear was convicted of felonious assault and an accompanying firearm specification. The trial court sentenced him to three years' incarceration on each and ordered the sentences to be served consecutively. This appeal followed.

In his first and second assignments of error, Lear argues that his conviction was against the weight and sufficiency of the evidence. It was not. Two Shell gas-station employees testified that Lear had fired a gun at the Shell station following a brief altercation with an employee. The shooting took place in broad daylight. And both witnesses testified that they had known Lear by sight prior to the shooting, thereby bolstering their identification of Lear and the state's theory that Lear had been the shooter.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Lear presented an alibi defense. Lear and Lear's girlfriend both testified that Lear had been at home during the shooting.

Viewing the evidence in a light most favorable to the state, we hold that there was sufficient evidence to convict Lear.² And although Lear presented a version of events that, if believed, would have exonerated him, the trial court did not so lose its way in choosing to believe the state's witnesses as to create a "manifest miscarriage of justice" warranting a new trial.³ Lear's first and second assignments of error are therefore overruled.

In his third assignment of error, Lear argues that trial counsel was ineffective. Lear specifically contends that counsel should not have withdrawn a motion to suppress, that counsel failed to argue a motion for a new trial, and that counsel should have been more familiar with Lear's background during sentencing. There is nothing in the record to indicate that counsel's performance was deficient.⁴ We overrule Lear's third assignment of error.

In his fourth assignment of error, Lear argues that his right to a fair trial was compromised by cumulative error. Since Lear has failed to demonstrate error, let alone cumulative error, this assignment of error is overruled.⁵

In his fifth assignment of error, Lear asserts that the trial court violated his right to due process. During sentencing, it appears that Lear had attempted to make a pro se oral motion to the bench requesting a new trial. The trial court did not allow Lear to proceed, instead telling him that he could appeal if he wished. Lear contends this was error and asserts that he should have been allowed to argue his motion. But Lear had not properly moved the court for a new trial. According to Crim.R.33(B), Lear was required to file a

² *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

³ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

⁴ See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

⁵ See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

motion within fourteen days of the court's guilty finding setting forth the alleged grounds for a new trial and, if appropriate, attaching supporting affidavits. Not only did Lear fail to file a motion, but his oral motion was made during his sentencing hearing, which was nearly five weeks after he had been found guilty. The trial court therefore did not err when it failed to conduct a hearing on Lear's untimely and improper motion.⁶ This assignment of error is overruled.

In his sixth and final assignment of error, Lear contends that his sentence was contrary to law. Lear's sentence fell within the legal range, and upon a review of the record, it is evident that the trial court did not abuse its discretion in imposing it. This assignment of error is therefore overruled on the authority of *State v. Foster*⁷ and *State v. Kalish*.⁸

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

HILDEBRANDT, P.J., HENDON and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 24, 2010

per order of the Court _____
Presiding Judge

⁶ See *State v. Darkenwald*, 8th Dist. No. 83440, 2004-Ohio-2693, ¶40.

⁷ 109 Ohio St.3d 1, 200-Ohio-856, 845 N.E.2d 470.

⁸ 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.