[Cite as *State v. Olcese*, 2011-Ohio-2456.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0045**
- vs -	:	
L. PETER OLCESE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 0062.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

L. Peter Olcese, pro se, PID: 554-182, Marion Correctional Institution, P.O. Box 57, Marion, OH 43301 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, L. Peter Olcese, appeals from the judgment of the Portage County Court of Common Pleas overruling his motion for a new trial based upon newly discovered evidence. For the reasons discussed below, we affirm the trial court's judgment.

{¶2} **Factual Background and Procedural Posture**

{¶3} Patricia Rohal's father, David Quincy Grove, was a founding member of the Davey Tree Expert Company, an employee-owned company. As a privately held company, Davey Tree's shareholders are either current employees or former

employees who own stock via stock certificates. Upon Mr. Grove's death, the stock certificates he accumulated as an employee passed to his wife, Jean Grove, Patricia Rohal's mother. In 1985, upon Mrs. Grove's death, 77,520 common shares of Davey Tree stock passed, via inheritance, to John and Patricia Rohal. The stock was ultimately valued at over $1,400,000.

{¶4} Throughout the late-1980s, into the 1990s, the Rohals received quarterly dividend checks from Davey Tree in the amount of $7,000 (two $3,500 checks made payable to each individual). The Rohals, however, desired to utilize their stock in a manner that could benefit their children and grandchildren as well as give them the option of donating to charities if they so chose. They initially decided to establish a trust. For reasons unknown, however, the trust was never funded and was eventually abandoned. They subsequently discussed their wishes with Sergio Alvarez, their friend and owner of a local garage where the Rohals had their vehicles serviced. Mr. Alvarez indicated he had an associate, Mr. Olcese, who had some financial expertise. Upon Mr. Alvarez's recommendation, the Rohals contacted Mr. Olcese and set up a meeting.

{¶5} During late 1996 through early 1997, the Rohals developed a professional relationship with Mr. Olcese. Mr. Olcese frequently met the Rohals at their residence where they discussed their financial goals. He offered several financial plans on the best way to serve the Rohals' interests and achieve their goals. The Rohals regularly emphasized that whatever financial plan they pursued, they wanted it to be "on the up and up." Mr. Olcese assured them any plan he recommended would not involve anything "immoral or illegal." Given Mr. Olcese's demeanor and business insights, the Rohals testified they believed he was a competent and trustworthy advisor.

{¶6} Upon Mr. Olcese's specific recommendation, the Rohals decided to liquidate their stocks, establish an off-shore foundation in Panama, and create a corporation in the United States to oversee the operations of the foundation. According to Mr. Olcese, the Rohal family would occupy seats as officers of the company and therefore have complete control and discretion over the operations of the foundation. If they wished to obtain money from the foundation, Mr. Olcese explained that the Rohals would simply have to make a formal request for the funds to be released to the company. Upon receipt to the company, the Rohals could utilize the funds as they wished. In honor of Patricia's father, the Rohals named the foundation "The David Quincy Grove Family Foundation" and the company was incorporated as the "D.Q.G. Consulting Services, Inc." The Rohals paid Mr. Olcese $4,000 for his advice and assistance as well as the expenses he incurred traveling to create the foundation.

{¶7} The Rohals subsequently contacted Davey Tree about selling back their shares. They requested the stocks be liquidated and the money be donated to The David Quincy Grove Family Foundation. Davey Tree complied and, on June 20, 1997, it issued a check in the amount of $1,410,864 to The David Quincy Grove Family Foundation. The Rohals gave Mr. Olcese the authority to pick up the check from Davey Tree and deposit the check, on behalf of the foundation, into a bank account in Panama.

{¶8} Once the foundation was established, the Rohals instructed Mr. Olcese to create a system in which they would receive a default quarterly distribution of $7,000, as the Rohals did not want to make continuous formal requests from the foundation but desired a consistent cash flow similar to the dividends they received prior to liquidating

the stock. Although Mr. Olcese indicated he would make the necessary arrangements, the Rohals received nothing until November 19, 1998. On that date, they received a check in the amount of $1,450, money requested from the foundation to pay for their granddaughter's orthodontia work.

{¶9} The check had an insignia on it which read "Banco Disa Republica De Panama" and was drawn on Chase Bank, New York, New York. Further, a cover letter which explained the purpose of the check was sent on stationary bearing the name "Alba Management International, S.A."[1] Neither the check nor the cover letter included a reference to the foundation. Furthermore, there were no actual signatures or names on the letter and, while the check included two "authorized signatures," they were illegible.

{¶10} Mr. Rohal testified that, from June 20, 1997 through November of 1998, he had requested Mr. Olcese to provide him with paperwork relating to the foundation, as well as the status of its accounts, e.g., a bank, an account number, a balance. He received no responses. On December 12, 1998, the Rohals arranged a meeting with Mr. Olcese at their home. Mr. Rohal and his son were present for the meeting, but Mrs. Rohal was unable to attend due to a prior commitment. The purpose of the meeting was to question Mr. Olcese why he had failed to provide the Rohals with any information regarding their money. In anticipation of the meeting, the Rohals requested Mr. Olcese to provide any information or documentation he had relating to the Rohals'

1. The foundation's charter indicated that "The Council of the Foundation shall be constituted by Alba Management International, S.A., a corporation with domicile in the city of Panama, Republic of Panama ***." Pursuant to the charter, the Council for the Foundation exercised all administrative control over the business workings of the foundation. At trial, Mr. Rohal testified he had never before seen the charter. He indicated, and the record reflects, that everything he reviewed relating to the foundation and company, he copied and dated and initialed. The copies of the charter submitted into evidence bore no dates or initials.

money, e.g., bank statements, receipts, disbursements, bookkeeping information, etc. Mr. Olcese arrived, however, with no records and offered no insight into the status of the foundation or its account(s). Mr. Rohal stated that if Mr. Olcese was unable or unwilling to provide the information, he intended to contact the police and file a report.

{¶11} After delivering the ultimatum, Sergio Alvarez, the Rohals' friend (and Mr. Olcese's former associate), arrived at the Rohal residence. At the sight of Alvarez, Mr. Olcese stood up and "bolted" toward the door. Mr. Rohal followed Mr. Olcese, still demanding answers and accountability. On his way out, Mr. Olcese announced that he refused to remain at the Rohal home and would answer no questions. Mr. Olcese retreated to his car and departed, leaving Mr. Rohal and his son looking on "in awe."

{¶12} On the heels of Mr. Olcese's abrupt flight, the Rohals contacted the Portage County Sheriff's Department. After Mr. Rohal explained their situation, the deputy merely instructed them to "tell [Mr. Olcese's] boss." No charges were filed against Mr. Olcese. In an unusual turn of events, however, Mr. Rohal was subsequently charged in the Portage County Municipal Court for allegedly assaulting Mr. Olcese. Mr. Rohal retained counsel and appeared to answer the charge. A date was set for trial, but the matter was dismissed for Mr. Olcese's failure to appear.

{¶13} On December 14, 1998, the Rohals wrote to Alba Management International, the "Council" of the foundation and the company apparently behind the issuance of the November check, regarding the status of the foundation and Mr. Olcese's role in administrating or overseeing the same. Their letter was addressed to one "Gustavo Chin, Grant Administrator," an individual Mr. Olcese had previously represented as an officer with whom the Rohals could communicate if they had

questions relating to the administration of the foundation. The letter acknowledged that appellant had been "informally representing" them in matters relating to the foundation. However, the Rohals communicated their belief that Mr. Olcese no longer represented their best interests or the best interests of the foundation. The Rohals asked that Alba Management, as an identifiable entity who played a role in issuing the November draft, to sever Mr. Olcese's ability to access "information or financial matters concerning the David Quincy Grove Family Foundation."

{¶14} The Rohals made additional attempts, through Gustavo Chin, to remove Mr. Olcese from any dealings relating to the foundation. They never received a reply from Mr. Chin and, in fact, at the time of trial, it was unclear whether he truly existed.

{¶15} On December 15, 1998, one day after the letter to Gustavo Chin was faxed, the Rohals received their first checks (totaling $7,000) which they believed were issued from the foundation pursuant to their original wishes. Similar to the November 1998 check, the checks bore the name of "Banco Disa" but were drawn on Chase Bank. Furthermore, these checks were accompanied by a cover letter written on stationary bearing the name "Consulting Board, Inc." According to the stationary, Consulting Board, Inc., was located in the same building as Alba Management International, i.e., World Trade Center, Panama. Further, the checks were sent via Federal Express in boxes bearing a return address to an additional company, "Sterling International Trustee, S.A." This company was *also* ostensibly operated out of the World Trade Center in Panama. The Rohals continued to receive these quarterly checks, drawn from banks in the United States, until March 17, 2001.

{¶16} In the meantime, on January 21, 1999, Mr. Olcese wrote the Rohals instructing them that he would not communicate with them via telephone due to the purported assault he suffered during the December 12, 1998 meeting. Mr. Olcese's letter concluded that he would only discuss matters with the Rohals by way of written correspondence. Mr. Olcese's letter was written on the corporate stationary of yet another apparent entity: "The Company of Arosemena and Olcese, Ltd." The address of this company was exactly the same as the address used by Alba Management International, S.A.

{¶17} On March 2, 1999, the Rohals wrote Mr. Olcese in response to his January 21, 1999 letter. In this letter, they emphasized that they had "old questions that have never been answered properly by [Mr. Olcese]." They therefore requested somebody from Alba Management International or the foundation to contact them in order to handle their business "more professionally and promptly." After receiving no response, the Rohals again attempted to communicate with Mr. Olcese on May 27, 1999. The Rohals, through Mrs. Rohal, expressing frustration and some exasperation wrote:

{¶18} "On[] December 1, 1998, we received a letter from Alba Management, S.A., Foundation Council, signed by Mr. Gustavo Chin, Grant Administrator. Later[,] on December 14, 1998, we faxed him a memo with some inquir[i]es where we specifically asked him to acknowledge receiving the above-mentioned memo. Needles[s] to say, he never replied nor made it a point to contact us in any way. After dozens of unanswered phone messages to you, I finally received a l[e]tter signed by you, dated January 21, 1999, with a copy of the fax we sent to Mr. Chin attached. In this letter, you stated

that[,] as a result of our correspondence to Mr. Chin, and some kind of incident which I frankly had no knowledge of, you had been advised not to communicate with me by telephone. However, I'm still puzzled as to how you obtained and used the private fax we sent to Mr. Chin. Why didn't Mr. Chin acknowledge our request? Furthermore, why haven't we been contacted by any representative[?]

{¶19} "*** It is with the hope that this time you will contact me or be so kind as to provide me with information on how to contact someone who can help in this situation. Any effort to do so would be expected and appreciated."

{¶20} On June 10, 1999, Mr. Olcese responded to Mrs. Rohal's letter. He first discussed the way in which a foundation functions, viz., a person or legal entity must submit an application to the foundation for a grant; once submitted, the foundation must decide whether to approve the funding of the grant. He observed that because no proposals for grants have been submitted, the foundation was, at that point, unable to act. He further indicated any such proposals or inquires should be sent to "the Foundation at the World Trade Center Panama, P.O. Box 832-0280, Panama City, Republic of Panama[,]" the same address as the "Consulting Board, Inc." (the company ostensibly controlling the issuance of the Rohals' quarterly distributions.) Mr. Olcese then explained that any questions about "Mr. Chin's actions or lack thereof must be answered by Mr. Chin."

{¶21} On August 27, 1999, the Rohals, through Mrs. Rohal, responded to Mr. Olcese's last correspondence. In part, Mrs. Rohal wrote:

{¶22} "*** I considered you a trustworthy and honest man. However, your inability to provide information and your evasive answers have proven to be incredibly frustrating not to mention detrimental to my health as well as the stability of my family.

{¶23} "***

{¶24} "*** In my files, I have several addresses which link to the same building. However, I repeatedly asked you [o]n various occasions to provide name/s, telephone and fax numbers and any other additional information relative to the Foundation in order to establish a better line of communication, instead of such an impersonal 'To The Foundation' that you so kindly suggested. That specific information, needless to say, also was never received.

{¶25} "*** In your memo you stated: 'my understanding is that in calendar year 1999, to date, no applications or proposals for grants have been received by the Foundation.' May I ask to whom you refer *** in order to obtain the information that leads you to such an amazingly accurate understanding? If you would give me this person's name and telephone number, perhaps I would speak with him/her.

{¶26} "This kind of resource that you seem to have access to, and for some inexplicable reason, you've never disclosed to me. I don't think I am being unreasonable in my request, after all, it should've been rightfully delivered to me by now."

{¶27} Mrs. Rohal again requested Mr. Olcese to provide tangible records relating to the foundation and concluded with a proposal to meet with Mr. Olcese personally.

{¶28} On September 29, 1999, Mr. Olcese, designating himself "Dr. L. Peter Olcese" for the first time, responded to Patricia Rohal's August correspondence. In his letter, he declined to meet personally with Mrs. Rohal because his life had been previously threatened after he declined to participate in a "fraud scheme" allegedly devised by Mr. Rohal. He further explained that the building addresses were the same because that particular building was the location of the post office in Panama. In other words, he asserted "[t]he mail in Panama is not delivered as it is in the U.S. The mail is inserted into a mail box and someone must go to the post office to obtain the mail."

{¶29} The record indicates the Rohals made more attempts to communicate with Mr. Olcese and/or the foundation, but never received a response. Because, however, they were still receiving the $7,000 distribution payments, they were basically confident the foundation was operating. On February 11, 2001, the Rohals, through D.Q.G. Consulting Services, Inc., directed the Consulting Board to double the quarterly payments to $14,000. The Rohals did not receive a response. However, on March 17, 2001, the quarterly payment they received was still $7,000. This payment was the last distribution the Rohals received.

{¶30} In July of 2001, after the Rohals did not receive their quarterly payment, they contacted the FBI. The FBI eventually referred the investigation to Portage County authorities. Although they diligently continued their attempts to contact Mr. Olcese as well as various other entities with which they were familiar, they were unable to reach anybody. In fact, many of the fax and/or phone numbers the Rohals possessed relating to the foundation were disconnected.

{¶31} After a lengthy investigation, the Portage County Grand Jury indicted Mr. Olcese on aggravated theft, in violation of R.C. 2913.02, a felony of the first degree. The grand jury supplemented the indictment with charges of theft, in violation of R.C. 2913.02, a felony of the fifth degree, and engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a felony of the first degree. Mr. Olcese entered a plea of not guilty to the charges and moved the court to dismiss the indictment on three bases: (1) improper venue; (2) a speedy trial violation; and (3) a violation of relevant statutes of limitations. The motions were overruled and the matter proceeded to a bench trial.

{¶32} After receiving all evidence, Mr. Olcese was convicted of aggravated theft; he was acquitted of the charge of theft; and the charge of engaging in a pattern of corrupt activity was dismissed for defects in the indictment. Mr. Olcese was subsequently sentenced to a term of five years imprisonment.

{¶33} Mr. Olcese appealed his conviction and, on September 25, 2009, in *State v. Olcese*, 11th Dist. No. 2008-P-0094, 2009-Ohio-5057, this court affirmed the trial court's judgment of conviction as well as its judgment relating to Mr. Olcese's motion to dismiss. In arriving at this conclusion, this court determined that the prosecution introduced sufficient, credible evidence to support Mr. Olcese's conviction. Id. at ¶67; ¶80. This court further opined Mr. Olcese's trial was held in the proper venue; the charges were brought within the applicable statute of limitations; and Mr. Olcese was not denied his right to a speedy trial. Id. at ¶91; ¶98; ¶117, respectively.

{¶34} Mr. Olcese later sought discretionary review from the Supreme Court of Ohio. The matter, however, was subsequently dismissed for Mr. Olcese's failure to file

a memorandum in support of jurisdiction as required by the Rules of Practice of the Supreme Court. See *State v. Olcese*, 127 Ohio St.3d 1436, 2010-Ohio-5613.

{¶35} On January 15, 2010, Mr. Olcese filed a "motion for new trial pursuant to Crim.R. 33 newly discovered evidence" (sic) in the trial court. Later, on March 16, 2010, appellant renewed his motion, asserting the same arguments. After considering arguments raised, the trial court overruled Mr. Olcese's motion without a hearing. He now appeals the trial court's ruling and assigns two errors for this court's review.

{¶36} **Motion for New Trial**

{¶37} For his first assignment of error, Mr. Olcese queries:

{¶38} "Whether the trial court erred and abused its discretion when it denied the defendants [sic] motion for new trial and refused to hold an evidentiary hearing."

{¶39} Before considering the merits of the above issue, the state of Ohio, in its response brief, mistakenly construes Mr. Olcese's initial assignment of error as a challenge to the subject matter jurisdiction of the Portage County Court of Common Pleas. We acknowledge that Mr. Olcese filed at least one motion challenging the subject matter jurisdiction of the Portage County Court of Common Pleas prior to the completion of briefing in this case. We further recognize that motion was initially held in abeyance. Once Mr. Olcese filed his appellate brief and did not assign as error the issue of subject matter jurisdiction, this court overruled his motion via judgment entry filed April 1, 2011. Given this ruling, it is unnecessary to revisit the issue of jurisdiction.

{¶40} That said, Mr. Olcese's initial assignment of error contests the trial court's decision to overrule his motion for a new trial without a hearing. In support, he asserts he was unavoidably prevented from discovering the evidence at issue prior to trial; he

claims that if he had possessed the alleged newly discovered evidence at the time of trial, its impact would have changed the result. Mr. Olcese therefore concludes the trial court should have granted his motion or, at least, held a hearing allowing him the opportunity to develop the evidence at issue. We disagree.

{¶41} **Newly Discovered Evidence**

{¶42} Crim.R. 33(A) provides, in relevant part, that a "new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: *** (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶43} Crim.R. 33(B) governs the procedures for filing a motion for new trial based upon newly discovered evidence and provides, in relevant part:

{¶44} "[the motion] shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

{¶45} **Delayed Crim.R. 33(A)(6) motion**

{¶46} In this case, the trial court rendered its decision on September 4, 2008. Mr. Olcese, however, filed his first motion on January 15, 2010. As Mr. Olcese waited over 16 months from the date the decision was entered by the court, he was well

outside the 120 day window. Because Mr. Olcese's motion was filed after the prescribed time expired, he was required to follow the procedure for filing a delayed motion. "The procedure for handling a delayed motion for new trial on account of newly discovered evidence is a two-step process. If a defendant wishes to file such a motion, he must first obtain leave of court to file the motion. After leave is granted, the defendant has seven days to file his motion for new trial." *State v. Valentine*, 11th Dist. No. 2002-P-0052, 2003-Ohio-2838, at ¶9, citing *State v. York*, 2d Dist. No. 2000 CA 70, 2001 Ohio 1528, 2001 Ohio App. LEXIS 1623.

{¶47} In this case, Mr. Olcese did not seek leave of the court to file his delayed motion. Rather, on January 15, 2010, he filed his first motion to which he attached various documents which Mr. Olcese characterized as newly discovered evidence. The documents included copies of powers of attorney for Alba Management; transmittal letters regarding transfers of Alba Management stock; and an affidavit from an associate of Mr. Olcese. According to Mr. Olcese, the documents demonstrated that, even though he was convicted as the only person acting on behalf of Alba Management at the relevant times, others, including Sergio Alvarez, "could have acted on behalf of said Alba[.] Nowhere in the motion does Mr. Olcese make a specific request that the court grant him leave to formally make his arguments.

{¶48} Because Mr. Olcese filed his merit motion without first seeking leave of court, he failed to comply with the necessary procedural steps set forth in Crim.R. 33(B). As a result, the trial court properly overruled his motion for a new trial. See *State v. Norman*, 10th Dist. No. 04AP-1312, 2005-Ohio-5087, at ¶8 (defendant's failure to obtain leave of court sufficient basis for overruling motion); see, also, *State v. Wooden* (Sept.

29, 1999), 9th Dist. No. 19398, 1999 Ohio App. LEXIS 4525, *4 (defendant requested, but did not receive leave of trial court; therefore, appellate court determined the defendant did not comply with Crim.R. 33).

{¶49} Notwithstanding this conclusion, Mr. Olcese included a paragraph captioned: "Unavoidably have been unable to be discovered" (sic) in the motion for new trial. Even were we to construe the contentions in this paragraph as a de facto "request" for leave, Mr. Olcese's motion still fails to meet the necessary standard of proof set forth under Crim.R. 33(B). The paragraph provides:

{¶50} "This Court is well aware defendant resides in the [Republic of Panama] and not in the United States. Wherefore, all of the defendant's evidence came from the [Republic of Panama] which prevented the defendant from presenting this evidence at trial. November 24th, 2009 defendant has now received several documents that existed but were not part of defendant's trial, due to defendant being unable to obtain any document (proof) that would have supported his defense at trial, Defendant was found Guilty by a bench trial, which never heard any of the evidence upon which defendant now relies pursuant to Crim.R. 33(A)(6)." (Bracketing sic.)

{¶51} A party seeking leave to file a delayed motion is required to demonstrate, by clear and convincing evidence, that he or she was unavoidably prevented from timely filing the motion for a new trial or from discovering the new evidence. *Valentine*, supra; see, also, *State v. Mathis* (1999), 134 Ohio App.3d 77, 79. A party is "unavoidably prevented" from filing a motion for a new trial where the party had no knowledge of the existence of the evidence or grounds supporting the motion for a new trial and, in the exercise of reasonable diligence, could not have learned of the matters within the time

provided by Crim.R. 33(B). *Mathis*, supra. The standard of "clear and convincing evidence" utilized in Crim.R. 33(B) is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶52} Mr. Olcese claimed he was prevented from using the evidence at issue because the documents were allegedly in Panama at the time of his trial. However, he does not argue, let alone demonstrate by clear and convincing evidence, that he lacked knowledge of the evidence. In fact, his motion suggests he may have been aware of the evidence prior to trial. In the course of arguing that he was unavoidably prevented from obtaining the evidence, Mr. Olcese states: "*** during trial, and before trial, defendant was **unable** to make calls to the [Republic of Panama] to obtain any of the new evidence on which Movant now relies." (Emphasis and bracketing sic.) Mr. Olcese's statement indicates the documents were available before trial and thus we cannot conclude he was unavoidably prevented from discovering them within the timeframe set forth under the rule.

{¶53} Building upon this point, Mr. Olcese's argument also fails to establish that, in the exercise of reasonable diligence, he could not have discovered the materials and filed a timely motion. If he could have made phone calls prior to or during trial to obtain the information upon which he now relies, he could have assuredly done so, either through counsel or another representative, within 120 days after the judgment. We

accordingly hold that, even construing the points discussed above as an attempt to seek leave, the arguments asserted in support fail to show Mr. Olcese was unavoidably prevented from filing the motion in a timely fashion as a matter of law.

{¶54} **Evidence fails to show strong probability of different result**

{¶55} Although the foregoing conclusions render any further analysis unnecessary, we point out that the substantive argument in Mr. Olcese's motion(s) for new trial is insufficient, as a matter of law, to require a new trial or a hearing.

{¶56} In *State v. Rock*, 11th Dist. No. 2005-L-005, 2005-Ohio-6291, at ¶24, this court stated a motion for a new trial may be granted where the newly-discovered evidence "'(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.'" Id., quoting *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶57} Here, Mr. Olcese fails to meet the first element of this test. In his motion(s), Mr. Olcese specifically asserted "he was convicted as the only person acting on behalf of Alba Management International S.A. ***." He points out, however, that the alleged newly discovered evidence reveals the possibility that others individuals "could have acted on behalf of said Alba ***." Mr. Olcese does not argue the new evidence would exclude him as a participant in the crime for which he was convicted. He simply indicates that the new evidence *might* inculpate others. Assuming Mr. Olcese is correct, the evidence would not free him from criminal liability, but merely indicate he was

complicit with others in the aggravated theft from the Rohals. In Ohio, a person who is guilty of complicity in the commission of an offense "shall be prosecuted and punished as if he was a principal offender." R.C. 2923.03(F). Consequently, even if Mr. Olcese demonstrated that other individuals participated in the underlying scheme, their participation would not, of itself, preclude Mr. Olcese's guilt.

{¶58} The trial court, therefore, was correct in concluding that Mr. Olcese's motion "does not disclose a strong probability that it would change the result of the trial previously held ***." We further hold, given the above analysis, the trial court did not abuse its discretion in ruling on Mr. Olcese's motion without an oral hearing.

{¶59} Mr. Olcese's first assignment of error is overruled.

{¶60} **Evidence of perjury**

{¶61} Mr. Olcese's second assignment of error asks this court to consider:

{¶62} "Whether the trial court erred and failed to protect the defendant's due process rights under Section 16, Art. 1 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution."

{¶63} Under his second assignment of error, Mr. Olcese asks this court to consider whether the alleged newly discovered evidence attached to his motion demonstrates that Mr. Rohal and Sergio Alvarez perjured themselves during his trial.

{¶64} Initially, even assuming Mr. Olcese met the requirements of Crim.R. 33 for filing a delayed motion, he failed to raise the instant argument in his motion(s) before the trial court. By failing to raise his perjury argument in the trial court, Mr. Olcese has waived it on appeal. See, e.g., *State v. Coleman*, 11th Dist. No. 2006-A-0075, 2007-Ohio-3204, at ¶39.

{¶65} Still, even had Mr. Olcese properly preserved the issue, his argument simply fails to support an inference that either Mr. Rohal or Mr. Alvarez committed perjury. With respect to the former, Mr. Olcese merely cites Mr. Rohal's trial testimony and, without support, blankly claims the substance of the testimony was a misrepresentation of material facts. Nothing in the cited testimony indicates Mr. Rohal perjured himself; further, nothing in the Wolfe affidavit is relevant to the issue of perjury. As we cannot conclude Mr. Rohal committed perjury on Mr. Olcese's assurances alone, the evidence and record fails to support Mr. Olcese's argument.

{¶66} Next, Mr. Olcese asserts Mr. Alvarez perjured himself when he testified he did not ask for a fee from Mr. Olcese as a result of the Rohal referral. In support, Mr. Olcese contends that two allegedly cancelled checks from Alba Management prove Mr. Alvarez was lying. First, the evidence of the checks is not inconsistent with Mr. Alvarez's testimony: Assuming Mr. Alvarez was paid sums of money by Alba Management in September of 1997, this does not imply the sums were a result of the referral, let alone establish Mr. Alvarez asked to be paid a referral fee from Mr. Olcese. Moreover, Alba Management, not Mr. Olcese, was the maker of the checks. To accept Mr. Olcese's argument vis-à-vis Mr. Alvarez's alleged perjury, we would have to assume (1) Mr. Olcese was the principal behind Alba Management *and* (2) the payments represent a requested fee for the Rohal referral. Although the former assumption was supported by circumstantial evidence at Mr. Olcese's trial, there is nothing to support the latter. Mr. Olcese's assertion that the new evidence supports the conclusion that Mr. Alvarez perjured himself is consequently without merit.

{¶67} Mr. Olcese's second assignment of error is without merit.

{¶68} In summary, Mr. Olcese failed to properly invoke Crim.R. 33 and, even had he complied with the rule and met the requirements for filing a delayed motion, the new evidence did not disclose a strong probability of a different result. Because Mr. Olcese's motion was procedurally and substantively inadequate, his two assignments of error are overruled. The judgment entry of the Portage County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.