

[Cite as *State v. Richard*, 2005-Ohio-1185.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84798

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
DONALD L. RICHARD	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	MARCH 17, 2005
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Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. CR-214217
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Judgment:	Affirmed
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Date of Journalization:

Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor KERRY A. SOWUL, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	DONALD L. RICHARD, PRO SE Inmate No. A197-168 Grafton Corr. Institution 2500 South Avon Belden Road Grafton, Ohio 44044
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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Donald L. Richard ("defendant") appeals, pro se, from the trial court's order granting the State's motion to dismiss defendant's most recent post-conviction relief petition.¹ For the reasons that follow, we affirm.

{¶ 2} This appeal is governed by R.C. 2953.23, which pertains to second, successive petitions or untimely petitions for post-conviction relief. The scope of review under R.C. 2953.23 is very limited. Specifically, in order for a court to entertain a delayed post-conviction relief petition under R.C. 2953.23, the petitioner must specify new evidence, demonstrate they were "unavoidably prevented" from discovering this new evidence, and show this new evidence demonstrates petitioner would not have been found guilty.

If these criteria are not met, the trial court may not even "entertain" a delayed petition. See *State v. Peebles*, Cuyahoga App. No. 81711, 2003-Ohio-183.

{¶ 3} Here, defendant presented no new evidence to the trial court. All of the alleged "fabrications" listed in defendant's petition were known to the defendant at or prior to trial and cannot be considered "new evidence." Indeed, defendant has raised these alleged "fabrications" in the numerous previous filings

¹Defendant's petition was captioned "Motion to Vacate Judgment of Conviction and Sentence Pursuant to the Court's Inherent Power, or, in the Alternative, Motion for Relief From Judgment, or Order, Pursuant to Civ.R. 60(B)(5) for 'After Discovered Fraud Upon the Court' in these Post-Conviction Proceedings." However, a 60(B) motion for relief from a criminal conviction is treated as a petition for post-conviction relief. See *State v. Szerlip*, 2003-Ohio-6954.

before this Court.² Accordingly, the trial court properly dismissed defendant's post-conviction relief petition.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., and
SEAN C. GALLAGHER, J., CONCUR.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

²Since defendant has filed numerous motions, it is difficult to ascertain the specific number of petitions filed pursuant solely to R.C.2953.21. See *State v. Hill* (1998), 129 Ohio App.3d 658.

