[Cite as *State v. Richard*, 2005-Ohio-6494.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86154

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
DONALD RICHARD	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	December 8, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-214217
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____
APPEARANCES:	
For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor RENEE L. SNOW, Assistant 1200 Ontario Street, 8th Floor Cleveland, Ohio 44113
For Defendant-Appellant:	DONALD RICHARD, SR., PRO SE Inmate No. A197-168 Grafton Correctional Institution 2500 South Avon/Belden Road Grafton, Ohio 44044

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant Donald Richard (appellant) appeals pro se from the trial court's decision denying his motion for a new trial based on newly discovered evidence. After reviewing the facts of the case and pertinent law, we affirm.

I.

{¶ 2} On June 2, 1987, a jury found appellant guilty of felonious assault with a gun specification, and the court sentenced him to a maximum of 18 years in prison. We affirmed appellant's conviction in *State v. Richard* (June 16, 1988), Cuyahoga App. No. 54040. Appellant is also currently serving a 15-years-to-life sentence for murder, which we affirmed in *State v. Richard* (Oct. 20, 1988), Cuyahoga App. No. 54228. Since his imprisonment, appellant has crusaded for his release, filing numerous motions for a new trial and for postconviction relief. All of appellant's attempts to overturn his conviction have failed, most often because he reiterates the same arguments over and over again. See, for example, the most recent of our affirmances, *State v. Richard* (July 21, 2005), Cuyahoga App. No. 85407.

{¶ 3} In Richard's latest attempt, he filed a motion entitled "defendant's motion for court order finding he was avoidably [sic] prevented from discovery of new evidence, pursuant to Crim.R. 33(B); and request to issue subpoena(s), pursuant to Crim.R. 33(A)(6)." On March 2, 2005, the court denied appellant's motion,

stating that "defendant's motion is a restatement of previously filed and overruled motions."

II.

{¶ 4} In *Delaney v. Cuyahoga Metro. Housing Auth.* (July 7, 1994), Cuyahoga App. No. 65714, we held that "*** an appellate court will ordinarily indulge a pro se litigant where there is some semblance of compliance with the appellate rules." However, pro se litigants are presumed to have knowledge of the law and legal procedures and are held to the same standards as litigants who are represented by counsel. *Quinn v. Paras*, Cuyahoga App. No. 82529, 2003-Ohio-4652.

{¶ 5} Appellant's two assignments of error are as follows:

> **"The trial court has participated in fraudulent concealment, violated oath of office, codes of judicial conduct, among other things, when it ignored appellant's affidavit submitted by a newly discovered witness, Jeff Ward, where the information attested in Jeff Ward's affidavit was in the sole control of Jeff Ward until late 2004, thus, the trial court's denial of appellant's motion for an order finding that he was unavoidably prevented from discovery of information/material/evidence was erroneous and violated appellant's constitutional due process rights to a fair and impartial tribunal under the United State [sic] Constitution's 14th Amendment."**
>
> **"The trial court erred, abused its discretion, and committed a willful violation of R.C. 2921.44 [dereliction of duty]; R.C. 2921.45 [interfering with civil rights]; R.C. 2921.32 [obstructing justice], inter alia, when denying appellant's 'actual innocence' motion and ignoring the undisputable, uncontroverted affidavit of Jeff Ward, in violation of the U.S. Supreme Court's *Schlup v. Delo*, where appellant attempted to correct a 'fundamental miscarriage of justice.'"**

{¶ 6} Specifically, appellant argues that almost every judge, as well as almost every lawyer, involved in his cases over the past 18 years is corrupt and has violated his constitutional rights, and as a result, he is entitled to a new trial. Most of appellant's argument is barred by res judicata, as we have affirmed his conviction, both on the merits and procedurally. See *State v. Perry* (1967), (holding that the principle of res judicata bars the further litigation of issues in criminal cases which were raised, or could have been raised, on appeal).

Newly discovered evidence

{¶ 7} The only "new" issue that appellant introduces is the February 18, 2005 affidavit of a man who claims his father "discharged a shot gun outside his apartment door one evening when [the victim] came to his home." This affidavit does not state when the alleged incident took place, other than "one evening," nor does it relate the alleged incident to any injuries the victim suffered.

{¶ 8} The statute that appellant relied on to support his motion for discovery of new evidence is Crim.R. 33, the pertinent parts of which read as follows:

> **"Rule 33. NEW TRIAL**
>
> **"(A) *Grounds.* - 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.
****

"(B) *Motion for new trial; form, time.*

****

"Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered *. 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."**

{¶ 9} We review a motion for a new trial based on newly discovered evidence for an abuse of discretion. See, *State v. Williams* (1975), 43 Ohio St.2d 88. To warrant a new trial, a criminal defendant must show that the newly discovered evidence 1) discloses a strong probability of changing the result if a new trial is granted; 2) has been discovered since the trial; 3) could not, with 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 prior evidence. *State v. Petro* (1947), 148 Ohio St. 505. In simpler terms, to obtain leave to file a motion for a new trial based on newly discovered evidence, a defendant needs to show by clear and convincing proof that he was unavoidably prevented from discovering such evidence within 120 days of the verdict. See *State v. Smith* (Mar. 27, 1998), Miami App. No. 97 CA 46.

{¶ 10} In the instant case, appellant failed to present any newly discovered evidence, as contemplated by Crim.R. 33. The man who is identified in the supporting affidavit in question as firing a shotgun in the victim's vicinity testified at appellant's 1986 trial. Therefore, this evidence could have easily been discovered before, or during, trial. In addition, it cannot be said with any amount of probability that this evidence would change the outcome of appellant's conviction. At his trial, two eyewitnesses testified that on November 25, 1996, they saw appellant fire a gun in the direction of the victim and that the victim's car window exploded, causing the injuries in question.

Judicial and prosecutorial misconduct

{¶ 11} Appellant's second assignment of error does not present an error for us to review so that we may affirm, modify or reverse the judgment appealed. For example, appellant argues that

> **"This Court, as does the apparently 'brain-dead' assistant prosecutors assigned to this appellant's appeals, perpetrate in red-herrings solely to prevent the exposure to the public of the outstretched lawlessness rife in this case. This Court practices in 'deliberate ignorance' and 'willful blindness' as a means for side-tracking all appeals brought to this Court, with the focus on preventing public disclosure *** that 'will' one day lead to the arrests of many who are masquerading as upholders of the Constitutions."**

{¶ 12} Appellant offers no specific examples to support his bold assertions and glistening generalities. App.R. 12(A)(2) allows a court of appeals to "disregard an assignment of error presented for

review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." See, also, *State v. Watson* (1998), 126 Ohio App.3d 316, 321 (holding that "[i]t is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any error. *** 'An appellate court is not a performing bear, required to dance to each and every tune played on appeal.'") (Internal citations omitted.)

{¶ 13} Accordingly, we find that no new evidence was presented to warrant a new trial, and the court did not err when it denied appellant's Crim.R. 33 motion. Appellant's two assignments of error are overruled.

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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

_____
ANTHONY O. CALABRESE, JR.
JUDGE

PATRICIA ANN BLACKMON, A.J., and

MICHAEL J. CORRIGAN, J., CONCUR.

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. II, Section 2(A)(1).