

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	SUPREME COURT CASE
)	NO. 09-0463
Appellee,)	
)	
vs.)	ON APPEAL FROM THE
)	COURT OF APPEALS,
ALFRED CLEVELAND)	NINTH APPELLATE
)	DISTRICT 08CA009406
Appellant.)	
)	LORAIN COUNTY COMMON
)	PLEAS COURT CASE NO.
)	95CR046754

MEMORANDUM OF APPELLEE IN
OPPOSITION TO JURISDICTION

DENNIS P. WILL, #0038129
 Lorain County Prosecuting Attorney
 Lorain County, Ohio
 225 Court Street, 3rd Floor
 Elyria, Ohio 44035
 (440) 329-5389

JACOB A. CAIRNS, #0075828
 Attorney at Law
 1720 Zollinger Road, Suite 202
 Upper Arlington, Ohio 43221
 (614) 266-2546

BY: **BILLIE JO BELCHER, #0072337**
 Assistant Prosecuting Attorney

ROBERT E. DAVIS, #0029697
 Attorney at Law
 55 Public Square
 1500 Illuminating Building
 Cleveland, Ohio 44113
 (216) 781-1285

DAVID B. MALIK, #0023763
 Attorney at Law
 8437 Mayfield Road, Suite 103
 Chesterland, Ohio 44026
 (440) 729-8260
 COUNSEL FOR APPELLANT

COUNSEL FOR APPELLEE

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**EXPLANATION OF WHY THIS CASE DOES NOT
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. The decision of the Ninth Judicial District Court of Appeals to affirm the denial of Appellant's petition for post conviction relief created no injustice as Appellant's arguments were addressed by existing case law.
2. No issue or substantial constitutional question exists in the Appellant's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest so as to warrant the exercise of this Court's jurisdiction.

STATEMENT OF THE CASE

On February 22, 1995, the Lorain County Grand Jury indicted Appellant on one (1) count of Aggravated Murder, a violation of R.C. 2903.01, an unspecified felony. On January 23, 1996, Appellant's case proceeded to jury trial; the trial was conducted over a span of six (6) days. During the trial, Appellant presented substantial evidence of his alibi. On January 30, 1996, the jury returned a guilty verdict as to the sole count of the indictment rejecting Appellant's alibi defense. On the same date, Appellant was sentenced to a term of twenty (20) years to life incarceration.

On February 27, 1996, Appellant filed timely notice of appeal with the Ninth District Court of Appeals. On March 5, 1997, the appellate court affirmed Appellant's conviction and sentence. See State v. Cleveland (March 5, 1997), 9th Dist. No. 96CA006357. Appellant also pursued a claimed appeal as of right with this Court that was ultimately rejected. Appellant also attempted at a later date to reopen his direct appeal and was unsuccessful. Again, Appellant also pursued a claimed appeal as of right with this Court that was ultimately rejected.

On December 2, 1996, Appellant filed a Motion for a New Trial. This motion was heard on June 9, 1997. On June 12, 1997, Appellant's motion was denied. On July 8, 1997, Appellant filed timely notice of appeal from the denial of his Motion for New Trial with the appellate court. On April

8, 1998, the appellate court affirmed the denial of the Motion for New Trial. See State v. Cleveland (April 8, 1998), 9th Dist. No. 97CA006840.

On July 6, 2006, Appellant filed a second Motion for New Trial and a Petition for Post Conviction Relief, and a Motion to Declare R.C. 2953.23 Unconstitutional. Appellee responded in opposition on August 4, 2006. On January 29, 2008, the trial court granted Appellant's motion and petition in part and denied the motion and petition in part. The trial court indicated that it would only hear evidence of William Avery Jr.'s, hereinafter Avery, alleged recantation of his prior trial testimony. The trial court denied Appellant's motion to hold R.C. 2953.23 unconstitutional.

On January 31, 2008, the matter proceeded to hearing. Both parties timely filed post hearing briefs and proposed findings of fact and conclusions of law. On April 25, 2008, the trial court denied Appellant's motion for new trial and petition for post conviction relief.

On May 21, 2008, Appellant filed notice of appeal with the Ninth District Court of Appeals. On February 2, 2009, the appellate court affirmed the denial of Appellant's Petition for Post Conviction Relief. See State v. Cleveland, 9th Dist. No. 08CA009406, 2009 Ohio 397.

On March 11, 2009, Appellant filed for leave to file a discretionary appeal with this Honorable Court. Appellee now responds and urges this Honorable Court to decline jurisdiction over the instant matter.

LAW & ARGUMENT
RESPONSE TO FIRST PROPOSITION OF LAW

I. CLAIMS OF ACTUAL INNOCENCE ARE NOT RECOGNIZABLE IN POST CONVICTION PROCEEDINGS.

R.C. 2953.21, Ohio's post conviction relief statute, is only available for denials or infringements of constitutional rights that render a judgment void or voidable. State v. Turner, 4th Dist. No. 01CA2786, 2001 Ohio 2636. See also State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686. It is manifest from the terms of the statute that two (2) elements are of

fundamental importance: the violation upon which the petitioner relies to establish his right to relief must be of constitutional dimension, and it must have occurred at the time the petitioner was tried and convicted of a criminal offense. State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686. The absence of either element in a given case is, in law, fatal to a post conviction claim. State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686, citing, State v. Powell (1993), 90 Ohio App. 3d 260.

Contrary to Appellant's position, federal courts have decided in a similar fashion. See State v. Harrington, 172 Ohio App. 3d 595, 2007 Ohio 3796, citing Herrera v. Collins (1993), 506 U.S. 390.

Ohio courts have been consistent in holding that a claim of actual innocence is not itself a constitutional claim, nor does it establish a substantive ground for post-conviction relief. State v. Nash, Eighth Dist. No. 87635, 2006 Ohio 5925, P14; State v. Watson (1998), 126 Ohio App.3d 316, 323. The court in Watson cited the Supreme Court of the United States in Herrera v. Collins (1993), 506 U.S. 390, which concluded a claim of actual innocence based upon newly discovered evidence did not state a basis for federal habeas corpus relief absent the occurrence of an independent constitutional violation at trial. See Herrera at 400.

Moreover, Ohio appellate courts, applying Herrera, have held that a defendant's claim of "actual innocence" based on newly discovered evidence does not provide substantive grounds for postconviction relief because it does not demonstrate a constitutional violation in the proceedings that actually resulted in the defendant's conviction. State v. Byrd Jr (2001), 145 Ohio App. 318. In relation to the Ohio constitution, a claim of "actual innocence" is not a constitutional claim or right that would render a judgment void or voidable; thus it does not establish grounds for a petition for post-conviction relief. Id., citing, Herrera v. Collins (1993), 506 U.S. 390; State v. Watson (1998), 126 Ohio App. 3d 316. Actual innocence is normally contested at trial and direct appeal on the basis of the weight or sufficiency of admissible evidence. State v. Turner, 4th Dist. No. 01CA2786,

2001 Ohio 2636. See also State v. Caulley, 10th Dist. No. 07AP-338, 2007 Ohio 7000, at P11. It does not form the basis for a collateral attack. Id.

In support of his claim of actual innocence, Appellant cited to affidavits allegedly signed by William Avery Jr. and David Donaphin. Avery Jr's affidavit contained sworn statements that differed from his trial testimony. Donaphin's affidavit is yet another variant of the alibi which was rejected by the jury during trial. Appellant also cited to documents prepared by witnesses in relation to his previously offered alibi. According to Appellant, those assertions, standing, either together or apart, were more than sufficient to grant him relief; that was inaccurate.

In regards to the affidavit of Avery, the recantation of a key trial witness does not arise to the level of a constitutional violation that is required before a trial court is able to grant post conviction relief. State v. Elkins, 9th Dist. No. 21380, 2003 Ohio 4522. Here, the mere fact that Avery signed a statement indicating a different version of the facts than portrayed during his testimony at trial does not amount to a constitutional violation. Since no violation was present, the trial court was precluded from granting relief.

In regards to Avery's testimony, the mere fact that Appellee requested that Avery be fully advised in regards to his rights as well as how his proposed testimony would relate to perjury charges did not prohibit Avery's testimony during the evidentiary hearing. It has always been Appellee's position that Avery testified truthfully at Appellant's trial as Avery was able to explain physical evidence recovered from the crime scene that he could have only explained had he been present prior to and during the murder. It is illogical that Appellee would be estopped from relying on Avery's prior truthful trial testimony simply because Appellee desired Avery to be adequately informed of his rights before he subjected himself to criminal liability by altering his prior truthful testimony.

In regards to the documents prepared by witnesses in relation to the alibi offered at trial, these claims were barred by the doctrine of res judicata. State v. Perry, 10 Ohio St. 2d at 176.

Paragraph nine of the syllabus in Perry states:

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

Appellant has failed to demonstrate that he was actually innocent, contrary to his assertion and any evidence regarding an alleged alibi was barred by res judicata.

Moreover, the doctrine of judicial estoppel is not applicable to the instant matter. In support of the contention that judicial estoppel is applicable, Appellant cites to a Ninth Circuit Court of Appeals case that is not binding on this Court. Also, this Court has specifically addressed the issue of judicial estoppel and has determined that the doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." Greer-Burger v. Temesi, 116 Ohio St. 3d 324, 2007 Ohio 6442, quoting Griffith v. Wal-Mart Stores, Inc. (C.A.6, 1998), 135 F.3d 376, 380. This Court has specifically noted that courts have applied this doctrine when inconsistent claims were made in bankruptcy proceedings that predated a civil action. ." Greer-Burger v. Temesi, 116 Ohio St. 3d 324, 2007 Ohio 6442.

The contentions raised in Appellant's first proposition of law are without merit and must be denied.

RESPONSE TO SECOND PROPOSITION OF LAW

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S PETITION FOR POST CONVICTION RELIEF.

Appellant's argument that R.C. 2953.23 is a legislative codification of the miscarriage of justice doctrine embodied in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111, even if true, is inapplicable to the instant matter. In Steffan, the Ohio Supreme Court utilized the "cause and prejudice standard" which includes the "miscarriage of justice doctrine" as the standard to determine whether further review/stay was necessary in death penalty cases where a criminal defendant had exhausted direct review, one (1) round of postconviction relief, and one (1) motion for delayed reconsideration under State v. Murnahan in the court of appeals and in the Supreme Court. The Court in Steffan never addressed the applicability of the cause and prejudice standard/miscarriage of justice doctrine to non capital defendants such as Appellant. It strains the Steffen decision to suggest that the holding applies equally to every non capital defendant in all post conviction proceedings. State v. Pough, 11th Dist. No. 2003-T-0129, 2004 Ohio 393.

Appellant next contends that in response to Steffen, the Ohio General Assembly enacted reform of R.C. 2953.23 to codify this Court's holding in Steffen. However, it is not clear that the Ohio General Assembly acted in response to the Ohio Supreme Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111 by amending R.C. 2953.23. This Court decided Steffen on September 28, 1994; R.C. 2953.23 was amended effective July 11, 2006. A significant amount of time lapsed between the actions of the Ohio Supreme Court and the actions of the Ohio General Assembly and therefore any link between Steffen and the amended version of R.C. 2953.23 is tenuous at best.

Since the cause and prejudice standard/miscarriage of justice doctrine is inapplicable to non capital defendants such as Appellant, this doctrine could not permit all of Appellant's claims in his petition for post conviction relief to be properly before the trial court when the trial court opted to permit Appellant a limited opportunity to present evidence as to a sole claim. State v. Pough, 11th Dist. No. 2003-T-0129, 2004 Ohio 393. To adopt Appellant's reasoning completely defeats the

statute. Appellate courts have been quite clear that "in the interest of providing finality to judgments of conviction, courts construe the post-conviction relief allowed under R.C. 2953.21(A)(1) narrowly". State v. Gondor, 112 Ohio St. 3d 377, 2006 Ohio 6679, quoting State v. Steffen, 70 Ohio St.3d 399, 410, 1994 Ohio 111. Appellant's interpretation of post conviction relief proceedings ignores the mandates of the Ohio General Assembly and the Ohio Supreme Court.

Accordingly, the trial court acted properly when it denied Appellant's entire petition for post conviction relief as nearly all of Appellant's claims were barred by res judicata and Appellant was unable to present evidence regarding the sole claim upon which the trial court permitted Appellant to present evidence. As such, the trial court properly denied Appellant's petition for post conviction relief.

Since the appellate court properly affirmed the determination that Appellant failed to satisfy the requirements of R.C. 2953.23, the appellate court acted properly when it affirmed the denial of Appellant's post conviction relief. As such, Appellant's second proposition of law must be denied.

RESPONSE TO THIRD PROPOSITION OF LAW

III. THE TRIAL COURT PROPERLY DETERMINED R.C 2953.23 CONSTITUTIONAL.

In regards to the alleged Supremacy Clause violation, Ohio courts have consistently held that "R.C. 2953.23(A)(2) is constitutional and does not violate the Supremacy Clause, the Doctrine of Separation of Powers, the 'due course of law' or the 'open courts' provisions of the Ohio Constitution." State v. Smith, 9th Dist. No. 04CA008546, 2005 Ohio 2571, citing, State v. Taylor, 8th Dist. No. 80271, 2002 Ohio 2742.

In regards to the alleged Suspension Clause violation, it must be preliminarily noted that Article I, Section 8 of the Ohio Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it." This section does not reference post conviction relief proceedings and their requirements.

This Court has long held that habeas corpus will not be substituted for an appeal or post conviction relief proceeding. Cornell v. Schotten, 69 Ohio St. 3d 466, 1994 Ohio 74 citing, In re Piazza (1966), 7 Ohio St.2d 102, and Bellman v. Jago (1988), 38 Ohio St.3d 55. This demonstrates that post conviction relief, a remedy sought by a defendant who has either been tried and found guilty beyond a reasonable doubt, or who has pled guilty and has been convicted, is separate and distinct from the remedy of habeas corpus. State v. Calhoun, 86 Ohio St. 3d 279, 1999 Ohio 102. It is unclear how the limitation of a separate, statutory remedy by the Ohio General Assembly violates the Suspension Clause of the Ohio Constitution, a provision that speaks solely to the remedy of habeas corpus.

In regard to the alleged violation of the Equal Protection Clause, it must be noted that statutes enacted in Ohio are presumed to be constitutional. State v. Williams (2000), 88 Ohio St.3d 513, 2000 Ohio 428. This presumption of constitutionality remains unless it is proven beyond a reasonable doubt that the legislation is clearly unconstitutional. Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7.

This Court has noted that the standard for determining violations of equal protection is essentially the same under state and federal law. Fabrey v. McDonald Police Dept. (1994), 70 Ohio St. 3d 351. "Where neither a fundamental right nor a suspect class is involved, a legislative classification passes muster if the state can show a rational basis for the unequal treatment of different groups." Id.

Here, neither a fundamental right nor a suspect class is involved. Some rights which have been recognized as fundamental include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the United States Constitution and the right to procreate. Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307. See, also, Albright v. Oliver

(1994), 510 U.S. 266. The ability to assert a claim of actual innocence in a post conviction relief proceeding not based on DNA test results does not fit with the category of fundamental rights. It is equally ludicrous to suggest that Appellant is part of a suspect class based upon his status as a prisoner. "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, quoting San Antonio Indep. School Dist. v. Rodriguez (1973), 411 U.S. 1. Appellant hardly falls within this definition of persons. As such, R.C. 2953.23 would be assessed utilizing a rational basis test.

In utilizing a rational basis analysis, it is clear that the State of Ohio has a legitimate interest in limiting the category of individuals who may utilize the statutorily created remedy of post conviction relief. This limitation seeks to conclude litigation arising from a criminal conviction and sentence. If this Court chose to declare R.C. 2953.23 unconstitutional, there would be no end in sight as to post conviction litigation.

Since the trial court properly determined that R.C. 2953.23 is constitutional, Appellant's third proposition of law is without merit and must be overruled.

RESPONSE TO FOURTH & FIFTH PROPOSITIONS OF LAW

IV. APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT ADVISED AVERY AS TO THE CONSEQUENCES OF PERJURY.

In response to Appellant's Due Process claim, Appellant relies exclusively upon a case from the New Jersey Supreme Court that has never been cited or adopted by any Ohio court. Moreover, Appellant cannot prove that Appellee "interfered" with the decision of Avery to testify. Appellee was entitled to ensure that Avery understood his rights as guaranteed by the United States and Ohio Constitutions as it related to self incrimination. Appellee was also entitled, if not

required, to ensure that Avery was given Miranda advisories when it was patently clear that if Avery testified in a fashion similar to his “deposition” and affidavit that he could be subject to a perjury charge.

Appellant also misstates the record in his merit brief when he writes “[w]hen Avery, Jr. requested a grant of immunity, the State refused, making it clear that it would prosecute him for committing perjury at Petitioner’s trial”. Appellant then cites to page thirty (30) of the hearing transcript in support of this statement. The relevant portion of page thirty (30) reads as follows:

Mr. Ortner: Judge, at this time we would like to ask if we can get immunity from the Prosecutor's Office for his testimony?

Ms. Swansinger: No.

No where in this exchange was “it made clear” Avery would be prosecuted for perjury by Appellee.

In relation to whether Avery was subject to criminal liability for the offense of perjury, the trial court acted properly when it advised Avery as to perjury charges as the statute of limitations had not expired. In fact, the statute of limitations could not have even commenced until Avery made his second statement.

In State v. Williams Jr., the Second District Court of Appeals held that, where a key witness for the State of Ohio recanted their trial testimony sixteen (16) years later, that prosecution for perjury was proper when the witness testified differently at the hearing for a new trial than at the trial. State v. Williams, Jr., 2nd Dist. No. 19854, 2004 Ohio 3135. The appellate court reasoned that the perjury charge was proper because the statute of limitations would have tolled, pursuant to R.C. 2901.13, until the State discovered the perjury. Id. This could not happen until the witness testified at the new trial hearing. Id.

In In Re: Stephen Drapp III, the Eleventh District Court of Appeals examined a matter where a key witness for the State recanted their trial testimony in the form of an affidavit after the verdict was returned. In Re: Stephen Drapp III (March 4, 1994), 11th Dist. No. 93-L-069. The Eleventh District Court of Appeals reasoned that because a motion for new trial was permitted to be supported by affidavit evidence that the defendant's affidavit recanting his trial testimony constituted the offense of perjury. Id.

Appellant's reliance on State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Company, 85 Ohio St. 3d 582, 1998 Ohio 408 is misplaced. In Climaco, the State of Ohio was on notice since early 1994 of a potential criminal act by the defendant yet an indictment was not returned for a misdemeanor falsification charge until 1996, beyond the two (2) year statute of limitations for a misdemeanor offense.

Based on the above precedent, it is clear that Avery could have been prosecuted for the offense of perjury had he testified differently at the motion for new trial/petition for post conviction relief. The perjury would not have been "discovered" until Avery testified at the hearing, thus triggering the statute of limitations.

Moreover, as Appellant is fully aware, Avery retracted his recantation from the first Lenworth Edwards trial. Avery then went on to testify consistently before four (4) different juries and was subject to cross examination in all four (4) trials. The crux of Avery's testimony was that Appellant and his co-defendants murdered Marsha Blakely. Subsequent to the four (4) trials, Avery made no contradictory statements until 2005 when Appellant's attorneys erroneously assured Avery that he could not be prosecuted for perjury. It is ludicrous to contend that Avery had no privilege against self incrimination as the statute of limitations had not expired.

In regards to the trial court's alleged impermissibly coercive questioning of Avery, the trial court's actions were perfectly proper as the statute of limitations for perjury as it related to Avery's

“recanting” of his trial testimony had not expired. Moreover, the trial court’s conversation with Avery was not “impermissibly coercive” as Appellant suggests nor did it constitute a “lengthy and intimidating warning”. The trial court had an obligation to ensure that Avery was fully advised of his rights and potential criminal liability prior to testifying at the hearing. In spite of the trial court’s advisements, Avery could have opted to testify but chose not to do so; not because of how the trial court spoke to him but because of the criminal repercussions.

The trial court properly instructed Avery as to his criminal liability for perjury because Avery was subject for prosecution for perjury. This was properly recognized by the appellate court, and accordingly, Appellant’s fourth and fifth propositions of law lack merit.

RESPONSE TO SIXTH & SEVENTH PROPOSITIONS OF LAW

V. THE TRIAL COURT PROPERLY DENIED APPELLANT LEAVE TO FILE HIS UNTIMELY MOTION FOR A NEW TRIAL AND PROPERLY DENIED APPELLANT’S MOTION FOR NEW TRIAL.

In regards to the denial of the motion for leave to file a new trial, the appellate court properly affirmed the denial of this motion. “The allowance of a motion for a new trial on the grounds of newly discovered evidence is within the competence and discretion of the trial judge; and in the absence of a clear showing of abuse, such discretion will not be disturbed.” State v. Lane (1976), 49 Ohio St. 3d 77 (vacated in part on other grounds in Lane v. U.S. (1978), 438 U.S. 911), quoting, paragraph two of the syllabus in State v. Williams (1975), 43 Ohio St. 2d 88. An abuse of discretion is more than an error of law or judgment, but instead implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. State v. Liddle, 9th Dist. No. 23287, 2007 Ohio 1820, citing Blakemore v. Blakemore (1983), 5 Ohio St.3d 217. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

In regard to claims of ineffective assistance of counsel, like most other claims in litigation, it must be raised at the earliest opportunity to do so. State v. Walker (June 20, 2000), 8th Dist. No. 74773, citing, State v. Williams (1996), 74 Ohio St. 3d 454. See also State v. Meyer (November 11, 1983), 6th Dist. No. L-83-186. The failure to do so operates as a bar to any further review of the ineffective assistance claim under the principles of res judicata, unless there is a demonstration under an applicant's circumstances that the application of res judicata would be unjust. State v. Walker (June 20, 2000), 8th Dist. No. 74773, citing, State v. Dehler (1995), 73 Ohio St. 3d 307; State v. Terrell (1995), 72 Ohio St. 3d 247; State v. Eskridge, (May 13, 1999), 8th Dist. No. 73673; State v. Borrero, (April 18, 1996), 8th Dist. No. 69289.

Here, the earliest opportunity for Appellant to raise an ineffective assistance of trial counsel claim would have been in a claimed appeal of right to this Court as counsel for Appellant's trial and direct appeal was the same. Appellant, acting pro se, pursued a claimed appeal as of right with the Ohio Supreme Court; alleging ineffective assistance of counsel. See State v. Cleveland (1997), 80 Ohio St. 3d 1447. Appellant also raised this issue in an Application to Reopen his direct appeal with the appellate court. Based on the appellate court's consideration of the request to reopen the appeal, the appellate court determined that res judicata precluded the trial court from granting relief on that issue. See State v. Cleveland (March 5, 1997), 9th Dist. No. 96CA006357, entry docketed July 29, 1997; State v. Cleveland, 9th Dist. No. 08CA009406, 2009 Ohio 397. Res judicata barred Appellant from asserting the issue and precluded the trial court from permitting Appellant leave to file a motion for new trial as to this issue. Res judicata also barred Appellant's additional claims as well.

Despite the clear dictates of Crim.R. 33, Appellant asserts that because his "investigation" into the facts supporting his claims in his petition for post conviction relief and/or motion for new trial took twelve (12) years, he is permitted to ignore Ohio Criminal Rules of Procedure as well as

statutes and case law because to do otherwise would require Appellant to litigate his claims piecemeal. Appellee is unaware of any rule, statute, or case that supports such a proposition.

In light of the purpose and construction of the criminal rules, a trial court may require a defendant to file his motion for leave to file a motion for new trial within a reasonable time after he discovers new evidence. Allowing the defendant to file a motion [for] leave [to file] a motion for a new trial at any time would frustrate the overall objective of the criminal rules in providing the speedy and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable delay. State v. Berry, 10th Dist. No. 06AP-803, 2007 Ohio 2244, quoting State v. York (Apr. 6, 2001), 2nd Dist. No. 2000 CA 70, 2001 Ohio 1528 (Citations omitted.).

Moreover, "[t]he allowance of a motion for a new trial on the grounds of newly discovered evidence is within the competence and discretion of the trial judge; and in the absence of a clear showing of abuse, such discretion will not be disturbed." State v. Lane (1976), 49 Ohio St. 3d 77 (vacated in part on other grounds in Lane v. U.S. (1978), 438 U.S. 911, quoting, paragraph two of the syllabus in State v. Williams (1975), 43 Ohio St. 2d 88.

While Appellant repeatedly suggests that Appellee "threatened to prosecute Avery for perjury", this is not supported by the record, as previously mentioned supra.

Avery's unwillingness to subject himself to criminal liability for the statements contained in the "deposition" and affidavit clearly indicate that those statements were false and that his trial testimony was accurate and true. Once erroneously assured that no criminal liability could attach, Avery was apparently willing to make whatever statement Appellant was willing to purchase. Appellant believes that Avery's affidavit and "deposition", coupled with his previous, jury rejected, alibi defense, conclusively establish that there is no possibility that Appellant would be convicted if retried. It is difficult to comprehend how Appellant could make such an assertion given that he was

convicted in spite of the alibi defense he presented during trial. Moreover, as previously discussed, the doctrine of judicial estoppel is inapplicable.

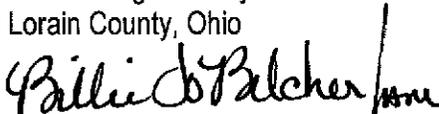
The trial court properly denied Appellant leave to appeal the claims asserted in his motion for new trial. The trial court also properly denied Appellant's motion for new trial as it related to Avery's alleged recantation. This was properly recognized by the appellate court in its decision. As such, Appellant's sixth and seventh propositions of law must be denied.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court decline jurisdiction over the instant matter.

Respectfully Submitted,
DENNIS P. WILL, #0038129
Prosecuting Attorney
Lorain County, Ohio

By:


BILLIE JO BELCHER, #0072337
Assistant Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5393

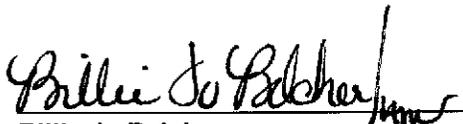
PROOF OF SERVICE

This is to certify that a copy of Appellee's Response was sent via regular U.S. Mail this 8th day of April, 2009 to: Counsel for Appellant:

Jacob Cairns
118 Graceland Blvd., #205
Columbus, Ohio

Robert Davis
55 Public Square
Cleveland, Ohio 44113

David Malik
8437 Mayfield Road, Suite 103
Chesterland, Ohio 44026


Billie Jo Belcher
Assistant Prosecuting Attorney