Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-258

FEBRUARY TERM, 2007

State of Vermont } APPEALED FROM:

}

}

v. } District Court of Vermont,

} Unit No. 1, Windham Circuit

Vito Russo }

} DOCKET NO. 1619-11-02 WmCr

Trial Judge: Katherine A. Hayes

In the above-entitled cause, the Clerk will enter:

Defendant appeals the district court=s denial of his motion for a new trial based on newly discovered evidence. We affirm.

In April 2003, a jury convicted defendant of aggravated assault, unlawful trespass, driving while intoxicated, and driving with a suspended license. This Court affirmed the convictions in State v. Russo, 2004 VT 103, 177 Vt. 394. Defendant filed a motion for sentence reconsideration in November 2004. He later sought and obtained assigned counsel. In November 2005, the district court denied the motion following a hearing, and a three-judge panel of this Court affirmed that denial in State v. Russo, No. 2005-502 (Sept. 28, 2006). Meanwhile, in April 2006, defendant filed a pro se motion for a new trial based on newly discovered evidence pursuant to V.R.Cr.P. 33. In the motion, defendant stated his belief that a hearing would produce evidence warranting a new trial. The State opposed the motion, arguing in part that it was wholly lacking in merit and therefore should be denied without a hearing. Defendant=s reply to the State=s response included a twenty-five-page attachment of various papers. The district court denied the motion for a new trial without

holding a hearing. In denying the motion, the court acknowledged that consideration of a motion for a new trial ordinarily requires a hearing, but nonetheless concluded that in this case no hearing was warranted because the motion was totally lacking in merit.

In his appeal to this Court, defendant argues that the district court abused its discretion by denying his motion without assigning him counsel and holding an evidentiary hearing. We find no error. With regard to defendant=s claim that the court should have appointed counsel for him, we note that defendant did not ask for assigned counsel. He did not file an application for a public defender with respect to his motion for a new trial, even though he did so in connection with previous and subsequent legal matters and proceedings. In the motion, he plainly stated that he was proceeding pro se but had been advised that if his request for a hearing were granted, an Aexpert . . . an attorney . . . very familiar with my case@ would present the case to the court. In his reply to the State=s response, Mr. Russo reiterated that he was pro se and that, if granted a hearing, an attorney Amay be willing@ to represent him. He also stated that he would either be assigned counsel or some other attorney would help with representation. Even considering defendant=s pro se status, these comments in his motion and reply can hardly be viewed as a request for assigned counsel, particularly in light of the fact that defendant had been represented by counsel in numerous prior criminal proceedings and was familiar with the process for requesting assigned counsel. As defendant himself confirms in his reply brief filed in the instant appeal, his earlier application for public defender services Ahad absolutely nothing to do with this case and matter,@ i.e. the motion for new trial.

Nor did the content of defendant=s motion compel the district court to assign counsel sua sponte or to hold a hearing. Although defendant repeatedly stated that, given a hearing, he would present newly discovered evidence that would warrant a new trial, his proffer, as the district court found, fell well short of demonstrating that he had uncovered legitimate newly discovered evidence with some potential to change the result of the original trial. See State v. Richards, 144 Vt. 16, 21 (1983) (stating criteria for determining whether newly discovered evidence warrants a new trial). Moreover, despite being represented by counsel, defendant fails to present in this appeal a plain statement of what newly discovered evidence could warrant a new trial.[1] We have held that, Awhen requested, an evidentiary hearing should be granted on a V.R.Cr.P. 33 motion for new trial based on newly discovered evidence, if the grounds relied upon are stated with particularity, and the motion is neither frivolous nor totally lacking in merit.@ State v. Unwin, 142 Vt. 562, 565 (1983). In this case, the record supports the district court=s conclusion that defendant=s motion failed to state the alleged newly discovered evidence with particularity and, as presented, was totally lacking in merit. Accordingly, the court did not err in denying the motion without holding a hearing.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] Although defendant attaches examples of Anewly discovered evidence@ in his pro se reply brief, these were not described with any particularity in his original motion before the trial court. These include an alibi that defendant was talking on his cell phone to another at the time of the alleged assault, that a witness saw defendant unarmed pass the putative victim without incident at the time of the alleged assault, and that two others would testify that the victim was a liar. We note, in passing, that none of the examples would warrant a new trial under Richards insofar as the cell phone alibi was not Adiscovered since the trial,@ there is no showing that the other witness Acould not have been discovered before the trial by . . . due diligence,@ and the evidence of dishonesty is Amerely impeaching.@ Richards, 144 Vt. at 21.

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