

[Cite as *State v. Bonilla*, 2009-Ohio-4784.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:

C.A.

CASE NO. 2008 CA 68

v.

:

T.C. NO. 98 CR 488

EDUARDO BONILLA

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

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OPINION

Rendered on the 11th day of September, 2009.

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ELIZABETH A. ELLIS, Atty. Reg. No. 0074332, Assistant Prosecutor, 61 Greene Street, Xenia,
Ohio 45385

Attorney for Plaintiff-Appellee

EDUARDO BONILLA, #383-585, Ross Correctional Institute, P. O. Box 7010, Chillicothe,
Ohio 45601

Defendant-Appellant

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DINKELACKER, J. (by assignment)

{¶ 1} Eduardo Bonilla¹ appeals from a judgment of the Greene County Court of Common Pleas, which denied his motion for a new trial. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} In 1999, Bonilla was convicted of seven offenses, including complicity to commit aggravated murder, complicity to commit murder, and complicity to commit kidnapping. At sentencing, the trial court merged several of the offenses and imposed consecutive sentences totaling life plus thirty years in prison. We set forth the facts underlying these offenses in Bonilla's direct appeal of his conviction and sentence. *State v. Bonilla* (Mar. 2, 2001), Greene App. No. 99 CA 118. We repeat those facts here.

{¶ 3} "The evidence presented by the State at trial demonstrates that Mark 'Corky' Miller sold drugs in the Dayton, Ohio, area. During the first six months of 1998 Defendant supplied large quantities of drugs to Miller for sale. In June 1998, just two days after meeting Stephanie Harden, Defendant was arrested in Dayton and spent a few days in jail. When Defendant was released on bail he immediately returned home to Chicago, accompanied by Stephanie Harden.

{¶ 4} "In August 1998, Waiman Yu and Tommy Oiler rented an apartment at Mallard Landing in Beavercreek, Ohio. Oiler and Yu would periodically collect money from drug sales

¹Bonilla has used several aliases. At trial, he testified that his name is, in fact, Juan Ramone Lopez. However, we will continue to refer to him as Bonilla.

made in the Dayton area and transport that money to Chicago where they turned the money over to Jose Lopez.² Defendant would then take the money to Lazaro Amezcua ('Begotez'). On one of these trips to Chicago on or about September 30, 1998, Oiler met Defendant outside Lopez's apartment. A few days earlier, Amezcua had threatened to kill Defendant and Lopez if they didn't get him the money he was owed. Defendant told Stephanie Harden that he would have to come back to Ohio and get his money from Miller one way or another.

{¶ 5} "On or about October 1, 1998, Waiman Yu and Tommy Oiler drove back from Chicago to Dayton. Jose Lopez, Stephanie Harden and Defendant were also in the car. During the drive back Oiler overheard a conversation between Defendant and Lopez wherein Defendant told Lopez that they would get their money from Corky Miller one way or another, either kill him or kidnap him. According to Oiler, Corky Miller owed a large drug debt.

{¶ 6} "After arriving back in Dayton, later that same day Oiler was present at a home in Vandalia when Defendant again repeated to Lopez that they had to get their money from Miller one way or another, if they had to kidnap him or kill him. Shortly thereafter, Vandalia police arrived at the scene and Oiler was arrested on outstanding warrants. Oiler told Vandalia police officer Dana Brown that Defendant and Lopez were drug dealers who were down here from Chicago and they planned on killing Corky Miller. Officer Brown contacted Det. Cole from the Beavercreek police department. Det. Cole spoke to Oiler who told him about the Dayton to Chicago drug operation and that Defendant and Lopez were down here from Chicago to either kidnap or kill Corky Miller because of a large debt that was owed.

{¶ 7} "On or about Friday, October 2, 1998, Lazaro Amezcua and a person known only

²Jose Lopez was an alias. The record reflects that Lopez's name was actually Miguel Steven Virruella Lopez, and he identified himself by that name at the May 23, 2007 and May 23, 2008 hearings on Bonilla's motion for a new trial.

as Victor came down to Dayton from Chicago. They were taken to Waiman Yu's apartment at Mallard Landing in Beavercreek, Ohio. The next day, Saturday, October 3, 1998, Stephanie Harden drove Victor and Jose Lopez to a Meijer's store where they purchased various types of ammunition and a fillet knife. Defendant spent much of that day with Corky Miller. Later that evening Defendant and Stephanie Harden drove to Yu's apartment at Mallard Landing where they met up with Jose Lopez, Lazaro Amezcua and Victor. While at that apartment Stephanie Harden overheard Amezcua telling Defendant about a plan to kidnap Corky Miller and take him back to Chicago if he didn't give the money to Amezcua and Defendant. Amezcua demonstrated for Defendant how he would tackle Miller from behind and tie him up with duct tape.

{¶ 8} "The next day, Sunday October 4, 1998, Defendant and Stephanie Harden drove to Rooster's restaurant about 3:30 p.m. where they picked up Corky Miller. After dropping Miller off at his home so he could pick up his own car, Defendant and Stephanie Harden proceeded on to Yu's apartment at Mallard Landing with Corky Miller following them. Along the way Defendant said to Stephanie Harden: 'That fool is about to die.'

{¶ 9} "When they arrived at Yu's apartment at Mallard Landing, Defendant told Stephanie Harden that he was scared he would not make it out of there alive. Defendant also said we have to get this money one way or another. Defendant told Stephanie Harden that once they entered she should go to the bedroom, close the door, and not come out no matter what until he told her to do so. Shortly after arriving, Defendant left and returned a few minutes later with Jose Lopez. After entering the apartment Defendant locked the front door behind him.

{¶ 10} "Stephanie Harden was watching out the bedroom door that was partially open. She heard Jose Lopez tell Corky Miller that the drugs were in the suitcase on the floor, take a look and tell us what you think. When Miller bent down to look in the suitcase, Amezcua

tackled Miller from behind and tried to wrestle Miller to the ground. Miller pulled out a gun and shot at Amezcua who then shot back. The two men fired back and forth at each other until Amezcua fell to the ground. When Miller then tried to run to the front door, Victor shot him several times in the back and Miller collapsed.

{¶ 11} “Corky Miller died in the apartment from his gunshot wounds. Jose Lopez and Defendant carried Amezcua to Stephanie Harden’s car and along with Victor they all headed back to Chicago. Along the way Defendant wrapped Victor’s gun up in his socks and threw it out the car window. Just a couple of exits before reaching Crown Point, Indiana, Victor decided to stop and get out of the car. Stephanie Harden, Defendant, Jose Lopez, and the mortally wounded Lazaro Amezcua proceeded on up Interstate 65 toward Chicago.

{¶ 12} “At the Crown Point, Indiana exit, Amezcua asked the others to get him to a hospital. They proceeded to follow road signs to St. Anthony’s hospital. Jose Lopez and Defendant removed Amezcua from the car and laid him down on the ground in front of the emergency room entrance. Hospital security and an off duty deputy sheriff immediately stopped Defendant and Lopez and questioned them. Subsequently, they along with Stephanie Harden were taken into custody by Crown Point, Indiana police. The following day Beavercreek police detectives arrived in Crown Point, Indiana, and questioned Harden, Lopez and Defendant. After being returned to the Greene County, Ohio, jail, Defendant told a fellow inmate about the plan to kill Corky Miller because he owed money for drugs.

{¶ 13} “Defendant was subsequently indicted on several charges including one count of Complicity To Commit Aggravated Murder, two counts of Complicity To Commit Murder, one count of Complicity To Commit Kidnapping, one count of Complicity To Obstruct Justice, one count of Conspiracy To Commit Aggravated Murder, and one count of Conspiracy to Commit

Murder. All of these charges were accompanied by a firearm specification.

{¶ 14} “At his jury trial Defendant denied participating in any plan to kidnap or kill Corky Miller. Defendant claimed that Corky Miller did not owe any money for drugs, and that no plan to kidnap or kill Miller ever existed. Defendant acknowledged that he had induced Miller to go to Yu’s apartment at Mallard Landing, but Defendant claimed he did this so that Miller could purchase drugs from Amezcua.

{¶ 15} “The jury found Defendant guilty of all of the charges, but not guilty on all specifications. At sentencing the trial court merged several of the offenses, and imposed consecutive sentences upon Defendant which totaled Life plus thirty years.” (Footnote added.) We affirmed Bonilla’s conviction and sentence. *Bonilla*, supra. Bonilla subsequently sought post-conviction relief, which the trial court denied.

{¶ 16} On October 20, 2005, Bonilla filed a motion for a new trial, and he subsequently filed several amended motions. He argued that Harden had recanted her testimony and that the prosecutors had suborned perjured testimony from her. He further claimed that his trial counsel rendered ineffective assistance by failing to interview Lopez and Yu, who would have offered favorable testimony, prior to trial. Bonilla’s motions were supported by affidavits from Harden, Yu, and Lopez.

{¶ 17} The trial court held hearings on Bonilla’s motion on May 23, 2007; March 21, 2008; and May 23, 2008. Harden, Yu and Lopez testified on Bonilla’s behalf. Each denied knowledge of a conspiracy to kidnap and kill Miller due to a drug debt, and all claimed that the prosecution had asked them to testify to facts which, although untrue, supported the State’s theory of the case. Harden stated that her false testimony at Bonilla’s trial included statements regarding “conversations that took place amongst the guys that I supposedly overheard about

them kidnapping Corky; about Moncy saying that this fool is about to die” and other statements as detailed in her affidavit.

{¶ 18} Steven Wolaver, former Chief Trial Counsel of the Greene County Prosecuting Attorneys Office and now a Judge on the Greene County Court of Common Pleas, General Division, and David Mesaros, Former First Assistant Prosecuting Attorney, testified on behalf of the State. They denied instructing witnesses to fabricate testimony, to say certain facts, or to lie during Bonilla’s trial.

{¶ 19} On August 14, 2008, the trial court overruled the motion for a new trial. The trial court concluded that Harden’s testimony at the hearing was not credible and that, even if her testimony were true, the outcome of Bonilla’s trial would not have been materially affected. The court also rejected Bonilla’s claim that his counsel had rendered ineffective assistance by failing to interview and call Lopez and Yu at his trial. The court denied this argument on res judicata grounds, stating that Bonilla had raised the ineffectiveness of his trial counsel on direct appeal and that the failure to interview witnesses “was something that Bonilla knew or should have known at the time his merit appeal was filed.”

{¶ 20} Bonilla, pro se, appeals from the denial of his motion for a new trial, raising seven assignments of error.

II.

{¶ 21} Crim.R. 33(A)(6) provides that a trial court may grant a new trial “[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.” “Before a new trial can be granted upon the basis of newly discovered evidence, the defendant must show that the new 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.” *State v. Petro* (1947), 148 Ohio St. 505; *State v. Vinzant*, Montgomery App. No. 22383, 2008-Ohio-4399, at ¶7.

{¶ 22} We review the trial court’s denial of a motion for a new trial for an abuse of discretion. *State v. Henderson*, Montgomery App. No. 21865, 2007-Ohio-5982. An abuse of discretion is “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

III.

{¶ 23} Bonilla’s first assignment of error states:

{¶ 24} “APPELLANT’S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE STATE WITHHELD EXCULPATORY AND FAVORABLE EVIDENCE FROM THE DEFENSE AND DUE TO PROSECUTORIAL MISCONDUCT.”

{¶ 25} In his first assignment of error, Bonilla claims that the State failed to provide exculpatory evidence known to the police and prosecutor, violating his right to due process as set forth in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. He argues that the prosecutor violated his constitutional rights by failing to disclose Yu’s and Lopez’s version of events to the defense prior to trial.³ The trial court did not expressly address Bonilla’s *Brady*

³We note that the State’s response to Bonilla’s first assignment of error does not address Yu and Lopez. Rather, it focuses on Harden and asserts that

argument, which was raised in a June 6, 2008 supplemental memorandum in support of his motion for a new trial.

{¶ 26} The prosecution’s withholding of evidence favorable to an accused “violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. “[F]avorable evidence is material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Kyles v. Whitley* (1995), 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490, quoting *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. A “reasonable probability” of a different result is demonstrated when the government’s suppression of evidence “undermines the confidence in the outcome of the trial.” *Id.* at 434. “Both exculpatory and impeachment evidence may be the subject of a *Brady* violation, so long as the evidence is material.” *State v. Gibson*, Butler App. No. CA2007-08-187, 2008-Ohio-5932, at ¶25, citing *Bagley*, 473 U.S. at 676. However, no constitutional violation occurs if the evidence that was allegedly withheld is merely cumulative to evidence presented at trial. *State v. Church* (Apr. 30, 1999), Clark App. No. 98-CA-36; *State v. Aldridge* (1997), 120 Ohio App.3d 122, 145.

{¶ 27} In his affidavit in support Bonilla’s motion, Lopez stated that, on October 5, 1998, he was “interrogated by two Greene [C]ounty detectives. During the investigation, I informed the two detectives that I did witness the incident in this case, however, I informed them that I did

there was no evidence, other than Harden’s uncorroborated testimony, that the prosecution suborned perjury. The State argued that we should defer to the trial court’s finding that Harden was not credible. We will address this argument in our discussion of Bonilla’s fourth assignment of error.

not know the reason why the incident occurred.” Lopez was subsequently indicted for and pled guilty to conspiracy charges, “because I was scared I would be found guilty.” Lopez stated that he sought to withdraw his plea because he is innocent, and that he told Wolaver “that I was innocent and that I never planned to kidnap Corky Miller with Eduardo Bonilla or the others charged. I told him that I did not know about a 240,000 dollars debt. I also told him that if he was to call me to testify [at Bonilla’s trial], I was going to testify to what I had just mentioned to him, even if it meant a 38 years sentence.”

{¶ 28} At the May 23, 2007 hearing on the motion for a new trial, Lopez reiterated that he had no knowledge that Miller owed a debt, nor did he have any knowledge of a plan to kidnap and/or kill Miller. Lopez asserted that he “didn’t even know what was going on” and that he was misled during his plea negotiations into believing that he would only have to testify against Victor to receive an early release from prison. Lopez indicate that Bonilla’s attorney had never contacted him. Lopez did not testify at Bonilla’s trial.

{¶ 29} Wolaver recalled having a conversation with Lopez, but he did not recall much of the substance of that conversation. Wolaver remembered telling Lopez that he wanted Lopez to testify against Bonilla and that he would receive a certain sentence if he cooperated with the State. (Wolaver did not recall the exact number of years that was promised.) Wolaver further recalled that, at some point after Lopez entered a guilty plea related to this case but prior to Bonilla’s trial, Lopez asserted that he “didn’t remember anything.” Wolaver stated that he never instructed Lopez to testify about certain events regarding the shooting. In a subsequent deposition, Wolaver was questioned about Lopez’s sentencing hearing, during which Wolaver had asked Detective Potts whether Lopez had “minimized or excluded” his involvement and had indicated that he “didn’t feel he was responsible for any of the crimes that were being charged”

against him. The detective had responded affirmatively.

{¶ 30} With respect to Yu, Yu stated in his affidavit that he was interrogated by detectives on January 21, 1999, about the shooting in his apartment. At that time, he told the detectives “that I did not know anything concerning the case.” At the hearing and in his affidavit, he indicated that he had written a statement for the police that merely repeated what he had learned from the police and the news media about the crime. He asserted, “When it happened, I didn’t know.” Yu stated in his affidavit that, days prior to Bonilla’s trial (and after he had pled guilty to conspiracy charges related to the murder), he informed Wolaver that he did not have prior knowledge of what happened in this case, and that he would testify to that effect. Wolaver recalled speaking with Yu regarding this case; however, he was unable to recall the substance of that conversation.

{¶ 31} Bonilla asserts that Yu’s and Lopez’s “version of facts” – that they had no knowledge of a debt or of a plan to kidnap and/or kill Miller – was exculpatory, because it would have supported the defense’s theory of the case, which was that there was no conspiracy to kidnap or kill Miller over a drug debt. Bonilla argues that the prosecutor withheld Lopez’s and Yu’s version of facts in order to avoid having its case weakened by their testimony as defense witnesses.

{¶ 32} Assuming that Yu’s and Lopez’s version of events was favorable to Bonilla, we find no reasonable probability that the outcome of Bonilla’s case would have been different. Prior to Bonilla’s trial, both Yu and Lopez had pled guilty to conspiracy charges relating to this incident, and Yu had provided a written statement to detectives which purported to detail his knowledge of the underlying facts. In light of their prior guilty pleas and prior statements, Yu and Lopez would have been subject to vigorous cross-examination, and their protestations of

innocence and of lack of knowledge would likely have been given little weight, if any, by the jury, particularly considering Harden's and Oiler's trial testimony that Bonilla and Lopez had discussed plans to kidnap or kill Miller and the testimony of Michael Roberts, the fellow Greene County inmate to whom Bonilla had talked regarding a plan to kill or kidnap Miller over a drug debt.

{¶ 33} Bonilla next argues that the prosecution "compounded its lack of duty" by failing to record Yu's and Lopez's statements recanting their prior admissions. We find no authority to support Bonilla's contention that the State was required to record the statements of a co-defendant.

{¶ 34} Bonilla's first assignment of error is overruled.

IV.

{¶ 35} Bonilla's second and third assignments of error will be addressed together. They state:

{¶ 36} II. "THE TRIAL COURT ERRONEOUSLY APPLIED THE DOCTRINE OF RES JUDICATA TO APPELLANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM WHEN (1) THE CLAIM IS NEW THEORY OF INEFFECTIVENESS NO[T] PREVIOUSLY RAISED[,] (2) INEFFECTIVENESS CLAIM IS BASED ON EVIDENCE DEHORS THE RECORD WHICH APPELLANT WAS UNAVOIDABLY PREVENTED FROM DISCOVERING AT THE TRIAL DUE TO COUNSEL'S INEFFECTIVENESS[,] AND (3) APPELLANT WOULD HAVE BEEN UNABLE TO DEMONSTRATE HOW COUNSEL'S ERROR PREJUDICED HIM AND HOW IT AFFECTED THE PROCEEDING WITHOUT RESORTING TO EVIDENCE DEHORS THE RECORD."

{¶ 37} III. “ APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHT. U.S. CONSTITUTION VI AMENDMENT. APPELLANT WAS DENIED A FAIR TRIAL DUE TO TRIAL COUNSEL’S INEFFECTIVENESS.”

{¶ 38} In these assignments of error, Bonilla claims that the trial court erred in rejecting his ineffective assistance of counsel claim on res judicata grounds. He further argues that his trial counsel rendered ineffective assistance by failing to interview Yu and Lopez and to call them as witnesses at his trial.

{¶ 39} “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.” *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus. See, also, *State v. Howard*, Clark App. No. 2008 CA 87, 2009-Ohio-3432, at ¶10. Thus, where a claim of ineffective assistance of trial counsel could be resolved based on the record on direct appeal, such a claim must be raised and a subsequent attempt to raise the claim will be barred by res judicata.

{¶ 40} Where a claim of ineffective assistance of counsel requires consideration of evidence outside of the appellate record, the proper avenue for raising such a claim is a petition for post-conviction relief, pursuant to R.C. 2953.21, and not through direct appeal. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228; *State v. Short*, Darke App. No. 06-CA-1679, 2006-Ohio-6611, at ¶21.

{¶ 41} On direct appeal, Bonilla asserted, among other things, that he was denied a fair

trial due to ineffective assistance of trial counsel. Bonilla complained that his trial counsel failed to object to certain evidence, including: (1) a remark by the prosecutor during opening statements regarding Harden's age; (2) testimony by Harden that she smoked marijuana with Bonilla and had sex with him right after they first met; (3) testimony by Harden that Bonilla struck her one time when she refused his request to drive one of the people involved in his drug trade, Yu, to a location in Fairborn, Ohio, to obtain a gun; (4) testimony by Harden that Bonilla was arrested by Dayton police and spent a week in jail just two days after she met him; and (5) testimony by Sarah Halstead, who lived in the apartment next to where the shooting occurred, on the ground that her testimony was cumulative of her husband's testimony. Bonilla also asserted that his trial counsel should have filed a motion to suppress the statements that he made to Crown Point police officers and should have timely objected to counts one, two, and four of the indictment. We rejected each of these arguments. See *Bonilla*, supra.

{¶ 42} Although Bonilla raised in his direct appeal several alleged instances of ineffectiveness by his trial counsel, we agree with Bonilla that he could not have properly raised this claim of ineffective assistance of counsel as part of his direct appeal. Bonilla's claim that his trial counsel should have interviewed and called Yu and Lopez as witnesses at trial requires consideration of matters outside of the appellate record. Accordingly, the trial court erred to the extent that it held that res judicata barred Bonilla's claim because he could have raised it on direct appeal.

{¶ 43} The State asserts that res judicata was nevertheless properly applied, because Bonilla has twice filed petitions for post-conviction relief, and he failed to raise his ineffective assistance of counsel claims in either petition. In his reply brief, Bonilla asserts that he could not have raised his ineffective assistance of counsel claim earlier, because he could not obtain

evidence to support his claim prior to the filing of his motion for a new trial. In other words, Bonilla asserts that the evidence supporting his ineffective assistance of counsel claim is “newly discovered.”

{¶ 44} We need not decide whether the trial court could have relied on res judicata based on the prior petitions for post-conviction relief because, even if his claim had been properly raised in his motion for a new trial, we find that Bonilla cannot demonstrate that his counsel acted ineffectively when he allegedly failed to interview Yu and Lopez and to call them as witnesses on Bonilla’s behalf.

{¶ 45} “In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. To show deficiency, the defendant must show that counsel’s representation fell below an objective standard of reasonableness. *Id.* Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. *Id.* The adequacy of counsel’s performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. *Id.* Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel’s perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

{¶ 46} “Even assuming that counsel’s performance was ineffective, the defendant must still show that the ineffectiveness adversely impacted the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.*” *State v. Dixon*, Montgomery App. No. 21823, 2008-Ohio-755, ¶22-23.

{¶ 47} Upon of the review of the record, Bonilla's counsel did not act unreasonably when he allegedly failed to interview Yu and Lopez and to offer them as witnesses on Bonilla's behalf at trial. As noted above, both Lopez and Yu had pled guilty to conspiracy charges arising out of Miller's death. Bonilla's counsel could have reasonably assumed that Yu and Lopez would not have favorable testimony to offer, considering that Bonilla's defense was that no conspiracy existed, and that, if their testimony were inconsistent with their pleas, the testimony would either be perjured or not credible. Bonilla's counsel's actions constituted reasonable trial strategy, which we will not second guess.

{¶ 48} The second and third assignments of error are overruled.

V.

{¶ 49} Bonilla's fourth assignment of error states:

{¶ 50} "APPELLANT'S CONVICTIONS WERE OBTAINED THROUGH THE GOVERNMENT'S KNOWINGLY [SIC] USE OF PERJURED TESTIMONY IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS."

{¶ 51} In his fourth assignment of error, Bonilla claims that the State knowingly used perjured testimony by Harden.

{¶ 52} Harden provided extensive testimony at Bonilla's trial. She detailed how she met Bonilla in June 1998 and moved to Chicago with him. While in Chicago, she met Lopez, Lopez's girlfriend, and Amezcua, and she learned that Bonilla was involved in drug dealing. Harden explained that Amezcua was Bonilla's "boss" and that Lopez, Yu, and Oiler worked for Bonilla. Harden has also met Miller once prior to her move to Chicago.

{¶ 53} Harden testified that, in September 1998, Amezcua came to her and Bonilla's

apartment three days in a row and threatened to kill Bonilla, Bonilla's mother, Lopez, and Lopez's girlfriend if "they didn't get his money." Bonilla told Harden that Miller owed him the money and that he (Bonilla) would have to return to Dayton to "get his money one way or another."

{¶ 54} According to Harden's trial testimony, Harden, Bonilla, and Lopez drove to Dayton with Yu and Oiler during the early morning of Thursday, October 1, 1998. Harden was dropped off at her sister's house. On Friday, Bonilla asked Harden to come to Yu's apartment in Beavercreek and to drive Yu to Fairborn so he could retrieve a gun. That evening, Harden went with Bonilla to meet Amezcua and Victor, who had arrived in Dayton.

{¶ 55} On Saturday morning, Harden took Bonilla to Miller's house. In the late afternoon, Harden, at Bonilla's request, picked up Lopez and Victor from the Beavercreek apartment and took them to Meijer, where Victor purchased ammunition, a fillet knife, beer, and a ski mask. Harden returned Lopez and Victor to the apartment, and went to her sister's house. Harden later met with Bonilla and Miller at a movie theater at the Dayton Mall. After the movie, Bonilla told Miller that he would call him regarding a meeting with Lopez, but that Lopez was drunk. Bonilla and Harden returned to the Mallard Landing apartment. There, Harden heard Amezcua tell Bonilla that they were going to kidnap Miller and take him back to Chicago. Harden stated that Amezcua acted out the plan as if it was Miller going to a suitcase; Amezcua said that he was going to "attack him and wrestle him to the ground and duct tape him." Amezcua asked Bonilla if he was ready, and told Bonilla to be back the following morning at 8:00.

{¶ 56} On Sunday afternoon, Harden took Bonilla to Rooster's restaurant, where Bonilla spoke with Miller in the parking lot. The three drove to Miller's house so Miller could drive in

his own car to the Beavercreek apartment. After Miller got out of Harden's vehicle, Bonilla said, "That fool is about to die." Upon reaching Mallard Landing, Harden, Bonilla and Miller entered the apartment, where Amezcua and Victor were waiting. Bonilla left briefly and returned with Lopez. Bonilla locked the apartment door behind them.

{¶ 57} Harden testified that, from a bedroom, she heard Lopez tell Miller to look in the suitcase. Through a crack in the door, Harden observed Amezcua tackle Miller and a gunfight ensue, during which Miller and Amezcua were both fatally wounded. Harden detailed the group's departure from the apartment, their drive toward Chicago, and their ultimate detention by police in Crown Point, Indiana.

{¶ 58} In her affidavit in support of Bonilla's motion for a new trial and in her testimony in support of that motion, Harden denied that she had knowledge of a \$240,000 drug debt and of a plan to kidnap Miller and take him back to Chicago to answer for the debt. Harden testified that she made several false statements at Bonilla's trial, including that she had witnessed the murder through a crack in the bedroom door, that Lopez had told Miller to unzip a suitcase and look at the drugs inside it, that Amezcua had threatened Bonilla regarding a drug debt, that she overheard conversations about plans to kidnap Miller, that Bonilla had told her that he was in fear for his life prior to entering the Mallard Landing apartment with Miller, and that Bonilla had said that "this fool is about to die."

{¶ 59} Harden testified at the May 23, 2007 hearing that she was provided the details of her trial testimony by the prosecutors. She indicated that she had several meetings with Wolaver and, to a lesser extent, Mesaros prior to her testimony, and that "we would go over things that supposedly had happened." As she had stated in her affidavit, she testified that she was promised that she would be released if she testified to those alleged facts, and that she was their

“star witness.” Harden further stated that her trial attorney was aware of the prosecutor’s request that she provide perjured testimony, and he encouraged her to do so.

{¶ 60} When asked why she had decided to provide an affidavit for Bonilla, Harden explained at the May 23, 2007 hearing that she decided to provide an affidavit for Bonilla because “I have two kids now and by me being a mother and making right choices in life, I felt like this was the right choice to make. I can’t hold this within me anymore. ***” Harden stated that she was the children’s foster parent through Montgomery County Children Services. At the May 23, 2008 hearing, Harden acknowledged that her mother had legal custody of her former friend’s two children, although Harden claimed to be their primary caregiver.

{¶ 61} Upon consideration of Harden’s testimony, the trial court concluded that Harden’s recantation was not credible. The court stated, in part:

{¶ 62} “In order for the court to believe that Harden’s affidavit and testimony at the hearing on this motion is true and credible, the court would need to find that the testimony of former Assistant Prosecuting Attorneys Wolaver and Mesaros is untrue. The court would also have to find that Harden’s statements to the Indiana police, her multiple and lengthy statements made to both the Beavercreek detectives, and the assistant prosecuting attorneys, and her trial testimony, which are all more or less consistent on the salient points, and mostly corroborated by other witnesses, is untrue. The court would also have to find that she perjured herself when she entered a guilty plea to the Conspiracy to Murder charge. And, the court would have to find that her attorney, Mr. Gump, after being advised that the prosecuting attorney was demanding that she perjure herself at trial, advised her to give the untrue testimony because it might help her receive a lesser sentence.

{¶ 63} “The court declines to make those findings, and instead, finds Ms. Harden to be

the one not credible at this time, and her recanted testimony to be not worthy of belief.”

{¶ 64} The trial court further found that, even if Harden’s recantation were true, it would not have materially affected the outcome of the trial.

{¶ 65} On appeal, Bonilla argues that the trial court should have granted him a new trial on the ground that the prosecutor knowingly presented perjury testimony when he had Harden testify at trial. Bonilla states that the evidence presented at the hearings on his motion for a new trial established that the prosecutor knew, prior to Bonilla’s trial, that Harden was asserting that she had no prior knowledge that the events of October 4, 1998. Bonilla notes that Harden’s counsel had file two motions – one on January 26, 1999, and another on September 17, 1999 – which claimed that Harden “had no idea what was going to take place at the time this alleged offense occurred.”

{¶ 66} We find no abuse of discretion in the trial court’s denial of Bonilla’s motion for a new trial based on Harden’s testimony. Upon reviewing the record and observing Harden’s testimony at the March 21, 2008 hearing, the trial court found Harden’s recantation not to be credible, and it credited the testimony of Wolaver and Mesaros denying that they had suborned perjury by Harden. The record supports the trial court’s findings. As noted by the trial court, Harden’s detailed testimony at trial was generally consistent with her prior statements, Oiler’s testimony, and the testimony of Michael Roberts, who related Bonilla’s description of the events of October 4, 1998 as told to him by Bonilla while they were both incarcerated at the Greene County Jail. Although Harden had not yet been sentenced, Harden had entered a guilty plea related to the shootings prior to Bonilla’s trial. Moreover, at the hearings on Bonilla’s motion, Harden testified inaccurately about her relationship to two children, initially claiming, without qualification, to be their mother.

{¶ 67} Contrary to Bonilla’s claims, the statements in Harden’s motions do not support the assertion that the State knowingly presented perjured testimony from Harden. The January 26, 1999 motion asked the court in Harden’s case to consider a sentencing memorandum to supplement the pre-sentencing investigation report for Harden. In that sentencing memorandum, Harden’s counsel stated that Harden was “influenced and controlled by her paramour at the time” but acknowledged that “this subservient characteristics does not excuse, condone, nor justify Ms. Hardin’s conduct, but does offer an explanation as to why and how she found herself involved in the offense which brings her before the Court.” Counsel continued: “Both defense and Ms. Hardin do not contest information as provided by police agents regarding the events and circumstances surrounding the instant offense. *** Ms. Hardin stands accountable for her conduct, and although it would be simple to blame the boyfriend for influencing her conduct, she accepts full responsibility and culpability.” Overall, the memorandum acknowledges Harden’s participation in a conspiracy, and counsel’s statement that Harden had “no prior knowledge or premeditation of the events” merely appears to deny that her actions were premeditated. The September 17, 1999 motion for psychological counseling appears to express the same lack of premeditation.

{¶ 68} Although the motions denied premeditation on Harden’s part, they would not reasonably place the prosecution on notice that Harden’s trial testimony was perjured. To the contrary, they reiterated that Harden admitted her involvement, did not contest the State’s version of events, and was prepared to be held accountable.

{¶ 69} The fourth assignment of error is overruled.

{¶ 70} Bonilla’s fifth assignment of error states:

{¶ 71} “APPELLANT WAS DENIED A FAIR TRIAL [DUE] TO THE CUMULATIVE EFFECT OF THE ERRORS SET FORTH IN FIRST, THIRD, AND FOURTH ASSIGNMENT OF ERRORS IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.”

{¶ 72} Bonilla next argues that the cumulative weight of the errors presented in his first, third, and fourth assignments of error denied him a fair trial. As discussed above, we have not identified any errors that were prejudicial to him. Although the Supreme Court of Ohio has stated that numerous harmless errors may cumulatively deprive a defendant of a fair trial and thus may warrant the reversal of his conviction, *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus, upon a thorough review of the record, we cannot conclude that prejudicial error exists in this case.

{¶ 73} The fifth assignment of error is overruled.

VII.

{¶ 74} Bonilla’s six assignment of error states:

{¶ 75} “THE TRIAL COURT ERRONEOUSLY FAILED TO HAVE AN EVIDENTIARY HEARING AND AN IN CAMERA INSPECTION OF THE ALLEGED CONFIDENTIAL DOCUMENT BEFORE QUASHING APPELLANT’S SUBPOENA DUCES TECUM.”

{¶ 76} In his sixth assignment of error, Bonilla claims that the trial court erred in quashing, without a hearing or an in camera inspection, a subpoena for a complaint that was filed with the Office of Disciplinary Counsel against Harden’s trial counsel. Bonilla asserts that the complaint would have substantiated Harden’s assertion that the prosecutors had pressured her to

provide false testimony and that her defense counsel had allowed her to be manipulated by the prosecution by allowing her to remain in solitary confinement for an extended period of time.

{¶ 77} On August 30, 2007, Bonilla requested a subpoena duces tecum for a copy of a disciplinary complaint against Harden's trial counsel. The complaint had been filed on Harden's behalf by Sully Barillas and Christy Deck during the first quarter of 1999. Bonilla attached to the praecipe a letter from Assistant Disciplinary Counsel Amy C. Stone, which denied Barillas's request for a copy of the grievance on the grounds that no formal complaint based on the grievance was filed and the records of the grievance remain confidential. The Ohio Attorney General, on behalf of the Ohio Disciplinary Counsel, moved to quash the subpoena on the ground that the complaint was not public, and it is prohibited from releasing the records. The trial court granted the motion to quash without a hearing or an in camera review of the disciplinary complaint.

{¶ 78} The trial court did not err in failing to view the complaint before quashing the subpoena. The Ohio Constitution grants authority to Supreme Court of Ohio to oversee the discipline of attorneys in Ohio. See Section 2(B)(1)(g), Article IV; *Judd v. City Trust & Sav. Bank* (1937), 133 Ohio St. 81. Under this authority, the Supreme Court has promulgated rules for the government of the bar, including disciplinary procedures. Gov.Bar R. V. Allegations of misconduct by attorneys must be addressed under these rules.

{¶ 79} When a complaint is filed, the allegation of misconduct must be investigated by a Certified Grievance Committee or the Disciplinary Counsel. Gov.Bar R. V(4). If the investigative body determines that there is probable cause to believe that misconduct has occurred, a complaint against the attorney will be certified to the Secretary of the Board of Commissioners on Grievances and Discipline. Gov.Bar R. V(11)(E)(2)(a).

{¶ 80} Under Gov.Bar R. V(11)(E), “[a]ll proceedings and documents relating to review and investigation of grievances made under these rules shall be private,” unless certain exceptions apply. By using the term “private,” the Supreme Court “acknowledges the right of the respondent to the right to privacy as to the proceedings relative to an uncertified complaint.” Gov.Bar R. V(11)(E)(2)(c)(i).

{¶ 81} Bonilla has not argued that the disciplinary complaint filed on Harden’s behalf is subject to disclosure under an exception set forth in Gov.Bar R. V or as a certified complaint. Accordingly, the uncertified complaint is not subject to disclosure, and the trial court did not err in failing to review the documents or hold a hearing regarding the complaint prior to quashing the subpoena duces tecum. *Everage v. Elk & Elk*, 159 Ohio App.3d 220, 2004-Ohio-6186.

{¶ 82} Regardless, we find no indication the complaint was material to Bonilla’s motion for a new trial. Accepting Bonilla’s assertion that the disciplinary complaint alleged that Harden’s trial counsel allowed her to be manipulated by the prosecutors, the complaint merely set forth allegations of misconduct; an unsubstantiated complaint is not evidence of misconduct by Harden’s counsel or by the prosecution. Moreover, the trial court was presented with evidence of Harden’s counsel’s alleged misconduct and of the filing of a disciplinary complaint against her trial counsel through Harden’s testimony at the hearings on Bonilla’s motion for a new trial. The complaint would have been merely cumulative of that testimony.

{¶ 83} The sixth assignment of error is overruled.

VIII.

{¶ 84} Bonilla’s seventh assignment of error states:

{¶ 85} “THE TRIAL COURT LACKED JURISDICTION TO MAKE A DECISION IN

APPELLANT’S MOTION FOR A NEW TRIAL WHEN A CERTIFICATE OF ASSIGNMENT FOR JUDGE SUMNER E. WALTERS WAS NOT FILED WITH THE CLERK OF COMMON PLEAS COURT AND THEREFORE THE PROCEEDINGS HELD BEFORE JUDGE WALTERS ARE VOID.”

{¶ 86} In his seventh assignment of error, Bonilla claims that Retired Judge Sumner E. Walters, who presided over the second and third hearings on his motion for a new trial and ruled on that motion, lacked jurisdiction to act in his case, because no certificate of assignment was filed.

{¶ 87} Bonilla’s argument is belied by the record. Contrary to Bonilla’s assertion, a certificate of assignment, signed by the Chief Justice of the Supreme Court of Ohio, was filed in Bonilla’s case on January 29, 2008. The certificate of assignment indicated that Judge Walters was assigned, effective December 10, 2007, “to preside in the Greene County Court of Common Pleas, General Division” to hear Bonilla’s case (and two other cases) and to conclude any proceedings in which he participated.

{¶ 88} The seventh assignment of error is overruled.

IX.

{¶ 89} The judgment of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Elizabeth A. Ellis

Eduardo Bonilla

Hon. Sumner E. Walters, Visiting Judge