[Cite as *State v. Walker*, 2004-Ohio-3966.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

WILLIAM C. WALKER

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2003CA00267

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2002CR01094
JUDGMENT:	Reversed and Vacated
DATE OF JUDGMENT ENTRY:	July 26, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
KATHLEEN O. TATARSKY ASSISTANT PROSECUTOR Post Office Box 20049 Canton, Ohio 44701-0049	JOHN N. MACKEY 217 Second Street, NW Suite 610 Bliss Tower Canton, Ohio 44702

Wise, J.

{¶1} Appellant, the State of Ohio, appeals the decision of the Court of Common Pleas, Stark County, which granted Defendant-Appellee William C. Walker's motion for a new trial following his conviction for robbery. The relevant facts leading to this appeal are as follows.

{¶2} Appellee was indicted by the Stark County Grand Jury on one count of aggravated robbery on September 9, 2002. The bill of particulars alleged that on the night of March 20, 2002, appellee threatened to shoot a Dairy Mart clerk and thereupon took money and three cartons of cigarettes from the store. Appellee pled not guilty and obtained counsel. A jury trial was conducted on October 15, 2002

{¶3} At trial, the State first called Terry Erb, the Dairy Mart store clerk. According to Erb, he was on duty on March 20, 2002, at about 9:30 P.M., when an African-American man with a goatee entered the store. The man, which Erb identified at trial as appellee, appeared to be on a "beer run," which Erb defined as the act of a person taking the product from a display area and just walking out the door without paying. Erb called the police, and a report was filed. In addition, a customer gave Erb the license number of a maroon automobile which the customer observed the man entering.

{¶4} According to Erb, at about 11:30 P.M., appellee returned to the store. Erb recalled that appellee, who was wearing a sweatshirt and acting like he was armed, ordered him to open the cash drawer. Erb further testified that appellee also demanded some Newport cigarettes and threateningly asked why Erb had called police about the earlier "beer run." Erb notified the police again after the incident.

{¶5} The State next called Canton Police Detective Don King. Detective King had investigated the events at Dairy Mart, and traced the license plate to a "William Walker." King prepared a photo lineup using appellee's BMV picture. About two months after the incidents of March 20, 2002, Erb picked appellee out of the photo lineup, testifying he was "very sure" the perpetrator was appellee.

{¶6} After introducing the store security videotape and the photographic lineup documents, the State rested its case. Appellee chose neither to testify nor call any witnesses on his behalf. Furthermore, no notice of alibi was filed by appellee prior to or at trial. The jury was instructed on the elements of aggravated robbery and the lesser included offense of robbery. The jury thereupon returned a verdict of guilty to the crime of robbery. With appellee's consent, the matter proceeded directly to sentencing. During the court's colloquy, appellee stated the following.

{¶7} "Uh, yeah. There is the chance that – the possibility that I was at the Crisis Center on the 20th. I didn't really have anyone look into that because I figured that with the tape that would be enough, but it was either the 19th or 20th I was at the Crisis Center. I would ask the Court to look – if we could check into that before sentencing." Tr. at 105.

{¶8} Nonetheless, the court proceeded to sentence appellee to a term of three years in prison for robbery. On December 24, 2002, appellee filed a motion for new trial, alleging newly discovered evidence. Appellee therein alleged that he was at a residence on Rem Circle NE in Canton at the time of the robbery. Following an evidentiary hearing on February 3, 2003, the trial court granted the motion for new trial, journalizing its decision on April 9, 2003.

{¶9} The State obtained leave to appeal from this Court, and herein raises the following sole Assignment of Error:

{¶10} "I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN GRANTING APPELLEE A NEW TRIAL."

I

{¶11} In its sole Assignment of Error, the State argues the trial court abused its discretion in granting appellee a new trial. We agree.

{¶12} The granting of a new trial lies in the trial court's sound discretion. *State v. Swanson*, Ashland App. No. 02COA048, 2003-Ohio-16, at ¶ 7, citing *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶13} Crim.R. 33 governs the granting of a new trial. In the case sub judice, appellant asserted "[t]he grounds for this motion are newly discovered evidence affecting materially Mr. Walker's substantial rights * * *." Crim.R. 33(A)(6) states in pertinent part as follows:

"(A) Grounds

{¶14} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶15} " * * *

{¶16} "(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. * * * . "

{¶17} In *Petro*, supra, the Ohio Supreme Court held the following at the syllabus:

{¶18} "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown 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." [Citation omitted.]

{¶19} Appellee's motion for a new trial included a copy of a counselor's report from the Crisis Intervention Center of Stark County, purporting to show that appellee was at said facility from 9:15 P.M. until 9:30 P.M., unsuccessfully seeking a bed in the detoxification program. Also attached to the motion were a transportation voucher from a private transportation company dated March 20, 2002, and an affidavit from appellee's mother concerning appellee's whereabouts at the time of the Dairy Mart robbery.

{¶20} During the evidentiary hearing on the motion, appellee presented witnesses to buttress the above documentation. A records custodian testified as to the aforementioned "nonadmit slip" from the Crisis Center. The records custodian also testified to the bill that the C & D Transportation Company sent to the center for "William Walker" for a trip from that location to 2229 Rem Circle on March 20, 2002. Appellee also subpoenaed the owner of C & D Transportation, who testified that appellee, along with another passenger, had been picked up by a company driver at 10:30 P.M. on March 20, 2002. The passenger, according to company documents, was taken to Aultman Hospital, while appellee was taken to the Rem Circle address. Finally, appellee's mother re-asserted the truth of her affidavit wherein she averred that appellee stayed at her apartment on Rem Circle from approximately 10:45 P.M. on March 20, 2002 until the following day.

{¶21} Despite the presentation of such evidence, however, the record reveals appellee provided no substantiation that this information could not with due diligence have been discovered earlier. Indeed, appellee's trial counsel noted the following during cross-examination by the prosecutor at the motion hearing:

{¶22} "Q. * * * And when you spoke with him the very first time, you were aware of the fact that he was saying that he had been at the Crisis Center and that he had called a cab and where he had been dropped off and that he wanted to say that he was at his mother's; is that correct?

{¶23} "A. No. Wait a minute. Called a cab for both of us and dropped her, being the pregnant lady, at Aultman Hospital. Took me to my mom's house. Yes, that's correct, I did.

{¶24} "Q. And you knew that the first time you talked to him?

{¶25} "A. Yes.

{¶26} "Q. Okay. And - -

{¶27} "A. Even before the first time I talked to him I knew that." Tr. at 25-26.

{¶28} Moreover, the trial court, in analyzing whether the evidence was discovered after the trial, observed as follows: "This was evidence that was out there since day one. The day you make your statement, that evidence is known. That's the double-edged sword there, right?" Tr. at 64.

{¶29} Therefore, although appellee's claims may warrant future post-conviction action, we find the trial court's decision in this matter to order a new trial, in the face of unequivocal verification in the record that the evidence was not "newly discovered",

constituted an abuse of discretion. Accordingly, the State's sole Assignment of Error is sustained.

{¶30} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby reversed and vacated.

By: Wise, J. and

Farmer, J., concur.

Hoffman, P. J., dissents.

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JUDGES

JWW/d 622

Hoffman, P.J., dissenting.

{¶30} I respectfully dissent from the majority opinion.

{¶31} I agree with the majority's conclusion the alibi evidence was not newly discovered; therefore, legally insufficient to satisfy the grounds for new trial under Crim. R. 33(A)(6). It is obvious the trial court recognized the evidence was not newly discovered as duly noted in the majority opinion. Despite this fact and despite the trial court's thorough knowledge of the rule, the trial court exercised its discretion to grant a new trial.

{¶32} The definition of abuse of discretion is one embedded into the minds of all appellate jurists. Abuse of discretion connotes more than an error of law or of

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. The result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

{¶33} I have previously written and questioned the wisdom of that portion of the standard of review for abuse of discretion which calls upon a reviewing court to affirm a trial court's decision despite the fact it made an error of law. This case causes me to reevaluate that position. Even though I agree the trial court made an error of law in granting a new trial, an error I suspect the trial court would readily acknowledge, under the circumstances presented herein, I cannot find the trial court's decision evidences perversity of will, defiance of judgment, nor passion or bias. By definition, abuse of discretion connotes more than an error of law. I conclude the trial court did not abuse its discretion in granting a new trial.

{¶34} Part of my reason for so concluding in this case is my concern about the uncertainty of the trial court being able to reach the same result through future post-conviction proceedings as suggested in the majority opinion. Given the procedural posture of this case, it would seem any direct appeal of appellant's conviction and sentence should include an assignment of error alleging ineffective assistance of counsel for failing to investigate and present an alibi defense. Such assignment of error would seem to be cognizable on direct appeal because the factual basis for the claim has been established in the trial court record through the hearing on appellee's motion for a new trial. If so, this court would consider the claim without any deference being given to the trial court's ruling on the new trial motion. Our analysis would include a

determination whether there is a reasonable probability the outcome of the trial court would have been different had the alibi evidence been presented.

{¶35} If appellant seeks post-conviction relief (assuming any direct appeal otherwise proves meritless), the trial court would exercise its discretion in deciding whether the basis for the relief is valid and merits a new trial. Our review of the trial court's decision on a post-conviction petition for relief would then be subject to an abuse of discretion standard. The procedural posture on appeal dictates this Court's standard of review, conceivably changing from non-deferential if the claim of ineffectiveness of counsel is asserted on direct appeal from the original conviction and sentence, to highly deferential if asserted on appeal from a post-conviction relief proceeding.

{¶36} Furthermore, it is arguable any future attempt to raise the claim through a post-conviction relief proceeding may well be barred by time limitations and/or the doctrine of res judicata, given the fact the alibi evidence is already in this appellate record.

{¶37} I would affirm the trial court's grant of a new trial.

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JUDGE WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:
	:
Plaintiff-Appellant	:

-vs-	:	JUDGMENT ENTRY
WILLIAM C. WALKER	:	
Defendant-Appellee	:	Case No. 2003CA00267

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and vacated.

Costs to the State of Ohio.

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JUDGES