[Cite as *State v. Bohanna*, 2010-Ohio-4911.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 10-CAA-05-0041
DANIEL N. BOHANNA	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 09-CRI 07-378
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 5, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRENDAN M. INSCHO Delaware Asst. Prosecuting Attorney 140 North Sandusky Street Delaware, OH 43015	JOHN R. CORNELY 21 Middle Street Box 248 Galena, OH 43021

Gwin, P.J.

{¶1} Defendant-appellant Daniel N. Bohanna appeals from the Delaware County Court of Common Pleas May 12, 2010 Judgment Entry granting the state's motion for summary judgment and denying his petition for post conviction relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} At approximately 10:30 a.m. on July 24, 2009 Joseph Garrick was delivering deposits at the US Bank located within the Meijer store located off of US 23 in Lewis Center. Mr. Garrick was the manager of a local Taco Bell. He testified that it was his practice to take the previous night's deposits, pick them up via the drive-thru window in a Taco Bell to-go bag, and take them straight to the US Bank for deposit. Witnesses later demonstrated to the jury with a map that the Meijer is located on the west side of US 23. Immediately south of the Meijer is a KinderCare daycare center; immediately south of the KinderCare is a Goodwill store. All of their parking lots are joined via Owenfield Drive.

{¶3} As he approached the Meijer door, a man ran towards Mr. Gerrick from across the parking lot, northbound from the direction of the KinderCare. Mr. Garrick later testified and Meijer video confirmed that the individual ran directly at Mr. Garrick. The individual was wearing a black hoodie and a mask. He kept his right hand in the hoodie's pocket throughout the ensuing exchange and flight. The man told Mr. Garrick to "give [him] the money." Mr. Garrick did not give the individual the receipts, but began to back up. The man followed and chased Mr. Garrick around the front of a vehicle. As Mr. Garrick fled, the individual began to run back towards the KinderCare.

{¶4} The suspect's flight took him past two individuals, Michelle Kendall and Melinda Snider. Both testified that they observed a man with dark pants running southbound, from the direction of Meijer past the KinderCare and towards the Goodwill. Ms. Snider testified that as the suspect ran in front of her, it appeared as if he "was carrying something. I did not see an item or object, but his arm was under his right side when he was running…His arm was not moving. It was tucked up under. His other arm was free." (T. at 105-106).

{¶5} Both Ms. Kendall and Ms. Snider described observing the suspect get into a red jeep that was parked in the Goodwill driveway. The jeep immediately pulled onto Owenfield Drive and turned eastbound onto Powell Road, in the direction of I-71. As the vehicle drove off, Ms. Kendall called 911 and gave the dispatcher the license plate number "R, as in Robert, 901455." (T. at 83). This plate was traced to Shawna Hopson.

{¶6} Detective Barbeau testified that Ms. Hopson's address was 3127 Crossgate Road, located in Columbus, Ohio. It took Det. Barbeau approximately 30-40 minutes to travel from the crime scene to that address. Arriving at approximately 11:40 a.m., the detectives waited at least forty-five minutes before approaching the Hopson residence.

{¶7} Detective Barbeau testified that appellant answered the door. Appellant initially wore only boxer shorts and denied that he was "Daniel Bohanna." Detective Barbeau did not believe appellant; appellant clearly had a tattoo on his upper left arm that said "Daniel." Appellant also initially denied that Ms. Hopson was present in the

house. In fact, she was found in the home. Ms. Hopson consented to the detectives searching the residence.

{¶8} During the search, detectives found a red jeep with registration R901455. Detectives searched the jeep and found inside it two handguns. The first was a semi-automatic gun found in the rear of the jeep, sticking out of the right-hand pocket of a pair of jeans. A revolver was also found in the front passenger-side door. Additionally, the search of the jeep revealed a hoodie, two pairs of shoes and another pair of pants.

{¶9} On July 31, 2009, the Grand Jury for Delaware County returned an indictment charging appellant with Aggravated Robbery, in violation of R.C. 2911.11(A)(1), a Firearm Specification, in violation of R.C. 2941.145, and Having a Weapon under Disability in violation of R.C. 2923.13(A)(1). The disability alleged was that the appellant was a fugitive from justice from Colorado Springs, Colorado.

{¶10} Prior to the commencement of the trial, the trial court, the prosecuting attorney and counsel for the appellant discussed issues concerning the having a weapon while under a disability charge, Count 2 of the Indictment. At that time, counsel for the appellant stated that he had not received any information about a warrant for appellant from Colorado Springs, Colorado.

{¶11} The jury trial began on October 20, 2009. Prior to empanelling the jury, a discussion took place about whether the appellant was under disability and the warrant. Defense counsel stated he understood it was a misdemeanor warrant, but he had not received anything about it. The position of the defense was that if it was a misdemeanor warrant from another State, then there was no disability. No motions were directed to that issue which the Court could address. No motion was made regarding the lack of

discovery and denying admissibility of documents or preventing any testimony about the warrant until a certified copy was produced.

{¶12} On the morning of October 22, 2009, the prosecution indicated that they were not presenting any additional evidence on the weapons charge because the certified records did not arrive from Colorado. The state moved to dismiss Count 2, Having a Weapon While under a Disability. The defense did not object.

{¶13} Appellant was found Guilty of the Aggravated Robbery and the three-year firearm specification.

{¶14} On December 7, 2009, the Trial Court sentenced appellant to four years imprisonment on Count 1 and three years imprisonment on the Firearm Specification. These prison terms are to run consecutive for a total sentence of seven years.

{¶15} Appellant filed a direct appeal, docketed as case number 09-CAA-12-0103.

{¶16} On March 11, 2010 appellant filed a Petition for Post-Conviction Relief alleging that the misconduct of the prosecuting attorney denied him the right to a fair trial. Appellant filed a Motion for Summary Judgment on March 30, 2010. The State of Ohio on March 31, 2010 filed a Memorandum Contra the Petition for Post-Conviction Relief and a Motion for Summary Judgment. On May 12, 2010, the Trial Court granted the State of Ohio's Motion for Summary Judgment.

{¶17} It is from the trial court's May 12, 2010 Judgment Entry granting the state's motion for summary judgment and denying his petition for post conviction relief that appellant has appealed, raising the following assignment of error for our consideration:

{¶18} "I. THE TRIAL COURT ERRED IN GRANTING THE STATE OF OHIO'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S PETITION FOR POST-CONVICTION RELIEF."

Standard of Review

{¶19} R.C. 2953.21(A) states, in part, as follows: "(1) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

{¶20} A petition for post-conviction relief is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233. Although designed to address claimed constitutional violations, the post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905; *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. A petition for post-conviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition[1]. *State v. Jackson* (1980),

[1] In the case at bar, neither party wished to have an oral hearing in the trial court. See, Judgment Entry Denying Defendant's Motion for Summary Judgment and Granting State's Motion for Summary Judgment on Petition for Post-Conviction Relief, filed May 12, 2010 at 1.

64 Ohio St.2d 107, 110, 413 N.E.2d 819. *State v. Lewis*, Stark App. No.2007CA00358, 2008-Ohio-3113 at ¶ 8.

{¶21} Evidence submitted in support of the petition "'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of [*State v. Perry* (1967), 10 Ohio St.2d 175] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'"(Citation omitted.); *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362. Thus, the evidence must not be merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205.

{¶22} Additionally, "where a petitioner relies upon affidavit testimony as the basis of entitlement to post-conviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284, 714 N.E.2d 905.

{¶23} In determining how to assess the credibility of supporting affidavits in post conviction relief proceedings, the Supreme Court adopted the reasoning of the First Appellate District in *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319, which had looked to federal habeas corpus decisions for guidance. Id. at 753-754, 651 N.E.2d at 1322-1323. The Supreme Court ultimately determined that the trial court should consider all relevant factors in assessing the credibility of affidavit testimony in 'so-called paper hearings,' including the following: '(1) whether the judge viewing the post conviction relief petition also presided at the trial, (2) whether multiple affidavits

contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.' *Calhoun,* 86 Ohio St.3d at 285, 714 N.E.2d at 911-912, citing *Moore*, 99 Ohio App.3d at 754-756, 651 N.E.2d at 1323- 1324." *State v. Kinley* (1999), 136 Ohio App.3d 1, 13-14, 735 N.E.2d 921, 930-31.

{¶24} A trial court that discounts the credibility of sworn affidavits must include an explanation of its basis for doing so in its findings of fact and conclusions of law in order that meaningful appellate review may occur. Id. at 285, 714 N.E.2d at 911-912.

{¶25} Another proper basis upon which to deny a petition for post conviction relief without holding an evidentiary hearing is res judicata[2]. *Lentz*, 70 Ohio St.3d at 530; *State v. Phillips*, supra.

{¶26} 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. Szefcyk* (1996), 77 Ohio St.3d 93, 671 N.E.2d 233, syllabus, approving and following *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the

[2] See note 1, supra.

syllabus. It is well settled that, "pursuant to res judicata, a defendant cannot raise an issue in a [petition] for post conviction relief if he or she could have raised the issue on direct appeal." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161, 679 N.E.2d 1131. Accordingly, "[t]o survive preclusion by res judicata, a petitioner must produce new evidence that would render the judgment void or voidable and must also show that he could not have appealed the claim based upon information contained in the original record." *State v. Nemchik* (Mar. 8, 2000), Lorain App. No. 98CA007279, unreported, at 3; see, also, *State v. Ferko* (Oct. 3, 2001), Summit App. No. 20608, unreported, at 5; *State v. Lawson*, supra 103 Ohio App.3d at 313, 659 N.E.2d at 366.

I.

{¶27} In his sole assignment of error, appellant maintains that prosecutorial misconduct resulted in reversible error. Specifically, appellant argues that his due process right to a fair trial was violated by the misconduct of the prosecution in presenting evidence on the second count, having a weapon while under a disability, when it knew that he did not have the evidence to prove the disability. The disability alleged was that the defendant was a fugitive from justice from Colorado Springs, Colorado.

{¶28} The trial court made the following findings,

{¶29} "Prior to empanelling the jury, the Court inquired as to certain preliminary matters. A discussion took place about whether the defendant was under disability and the warrant. Defense counsel said he understood it was a misdemeanor warrant but he had not received anything about it. The position of the defense was that if it was a misdemeanor warrant from another State, then there was no disability. No motions were

directed to that issue which the Court could address. No motion was made regarding the lack of discovery and denying admissibility of documents or preventing any testimony about the warrant until a certified copy was produced.

{¶30} "The Court in empanelling the jury did read the indictment. No mention of the second count was made during opening statements. Not until Shawna Hopson testified were questions asked pertaining to whether the defendant had obtained a copy "of his history" from the law firm where he had worked. She answered "history of what." The prosecutor then asked if he kept "a print out in the drawer of his dresser." (Page 163 Transcript)

{¶31} "The detective then testified (page 250 Transcript). When asked, "How do you check and see if somebody's got a warrant out for them?" the detective said he would run their social security number through LEADS or OLEG. Question: "On the day that you knocked on the door and Mr. Bohanna was standing in front of you did you at that time know whether there was an active warrant out for his arrest?" Over objection, the detective answered, "Yes, I did." Question: "Was it your intention to take him into custody on that warrant?" Answer: "Yes." (P. 250- 251 transcript) Question: "You said you were aware of a warrant outside, out of Columbus for his arrest; correct?" Answer: "Yes."

{¶32} "On the morning of October 22, 2009, the prosecution indicated that they were not presenting any additional evidence on the weapons charge because the certified records did not arrive from Colorado and moved to dismiss Count 2, Weapons Under Disability. The defense did not object. The Court is unaware of what evidence the State possessed and what discovery was presented to the defense to show a warrant

was active for the defendant from Colorado. The Court only has the statement of the prosecutor about attempts to obtain a certified copy of the warrant before trial. The Court only assumed that whatever documentation the State had, was shared with the defense. In addition, the defendant did apparently have a warrant from Franklin County for a No Operators License charge. No dispute on the facts exists. The petition rests on the facts contained in the trial transcript." Judgment Entry Denying Defendant's Motion for Summary Judgment and Granting State's Motion for Summary Judgment on Petition for Post-Conviction Relief, filed May 12, 2010 at 1-3.

{¶33} During the trial, prior to dismissing the charge, the prosecuting attorney informed the trial court,

{¶34} "Yes, Your Honor, for the record I would like to state that we had requested the certified records from Colorado very late and I regret I don't have the documents in front of me. They sent a letter back saying that they would not send it without payment of a substantial fee. We're not talking about a dominus [sic.], you know, five bucks, or something. We went back and forth with them trying to –contacted them at any rate and contested that and asked them to provide it as a courtesy, not wanting to incur the cost that were asked. At any rate, it didn't arrive. When I discovered as we were preparing our exhibits Monday, the day before trial, that it had not arrived, I put my personal credit card out and called or had my Administrative Assistant, Terri Scott, call to ask that it be provided by Fed-Ex. As of yesterday, close of business, we had not received it. I fully expected to have that certified record on the fugitive from justice matter and because we do not, I do not wish to proceed on that charge." (T. at 310-311). The trial court then instructed the jury,

{¶35} "Also, there's one charge that remains for your determination, which is Count One, the Aggravated Robbery charge and the specifications, firearm specifications. There's no longer a Count Two. So you don't need to think about that, consider that. In fact, you shouldn't think about it, consider it. Don't discuss it, don't wonder why it's no longer before you. It's just not. So please don't discuss it and wonder why it's not. It's just not and you only have one charge for your consideration." (T. at 316-317).

{¶36} A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402-405, 613 N.E.2d 203; *State v. Treesh* (2001), 90 Ohio St.3d 460, 480-481, 739 N.E.2d 749. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78. The effect of the prosecutor's misconduct must be considered in light of the whole trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 94, 568 N.E.2d 674; *State v. Maurer* (1984), 15 Ohio App.3d 239, 266.

{¶37} However, a cross-examiner may ask a question if the examiner has a good faith belief that a factual predicate for the question exists. *State v. Gillard* (1988), 40 Ohio St.3d 226, paragraph two of the syllabus. Ohio courts have found a lack of good faith in cases where prosecutor tactics made such a conclusion "obvious." *State v. Girts* (July 28, 1994), Cuyahoga App. No. 65750, unreported. In *State v. Daugherty*, the court reversed a conviction for driving under the influence. *State v. Daugherty* (1987), 41 Ohio App.3d 91. In *Daugherty* the *a*ppellant testified that she had worked at

a restaurant until 11:15 p.m., and then had consumed one beer prior to her arrest at 1:50 a.m. Id. On cross-examination, the prosecutor, under the pretext of asking a question, in effect stated to the jury that a manager of the restaurant had records showing that the accused had left the restaurant at 6:30 p.m. Id. at 91-92. The accused was the final witness to testify, and the state rested upon unsuccessfully moving, in the presence of the jury, for a continuance to secure the testimony of the manager. Id. at 92. In a post-conviction hearing, it was revealed that the restaurant's employment records confirmed the accused's account. Id. The court of appeals concluded that it was "self-evident" that the prosecutor made his testimonial assertion in awareness of his lack of a factual basis therefore, at a point in the proceedings calculated to have maximum effect upon the jury. Id.

{¶38} In *State v. Girts*, a prosecutor cross-examining an accused murderer asked the witness about an alleged admission of the crime he made to a fellow prisoner, without producing any evidence of the alleged conversation. *State v. Girts* (July 28, 1994), Cuyahoga App. No. 65750, unreported. The court found the prosecutor's lack of a good faith basis for the allegation to be "obvious from his tactics." Id.

{¶39} Prosecutors must avoid insinuations and assertions calculated to mislead. They may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence. See *State v. Lott(*1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, 3000; *State v. Smith(*1984), 14 Ohio St.3d 13, 14,470 N.E.2d 883, 885; *State v. Liberatore*(1982), 69 Ohio St.2d 583, 433 N.E.2d 561.

{¶40} * * * [G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. * * * [Citations omitted.] * * *

{¶41} "* * * [I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless including most constitutional violations." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980, certiorari denied (1985), 469 U.S. 1218, 105 S.Ct. 1199. See, *State v. Lott*, supra 51 Ohio St.3d at 166, 555 N.E.2d at 301.

{¶42} In *State v. Lott*, supra the prosecutor's misconduct in making misleading comments and discussing matters unsupported by the record was not grounds for reversal where defendant failed to show prejudice.

{¶43} In the case at bar, when considering the impact of the prosecutor's statements in the context of the entire trial, we cannot say that appellant was denied a fair trial.

{¶44} We agree with the trial court that the admission of the limited testimony set forth above did not permeate the entire atmosphere of the trial. *United States v. Warner* (6th Circuit, 1992) 955 F.2d 441, 456. The entire focus of the trial was on the Aggravated Robbery charge. The second count evidence was limited to those questions and answers set forth above.

{¶45} The focus of the prosecution and the defense was on the identification of the appellant as the person who tried to rob the victim who was carrying the bank deposit. All the testimony and evidence presented with the exception of the questions

and answers set forth were geared toward the identification issue. The warrant and fugitive from justice issue was a minor, secondary, and insignificant part of the trial.

{¶46} In *Bruton v. United States* (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, the United States Supreme Court noted:

{¶47} "* * * Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

{¶48} Further, "juries are presumed to follow their instructions." *Zafiro v. United States* (1993), 506 U.S. 534, 540, 113 S.Ct. 933. "A presumption always exists that the jury has followed the instructions given to it by the trial court," *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d 1313, at paragraph four of the syllabus, rehearing denied, 54 Ohio St.3d 716, 562 N.E.2d 163, approving and following *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413; *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E. 566. The appellant has not cited any evidence in the record that the jury failed to follow the trial court's instruction not to consider the evidence concerning Count 2.

{¶49} Under these circumstances, there is nothing in the record to show that the jury would have found the appellant not guilty had the comments not been made on the part of the prosecution. In the circumstances of the case, no prejudice amounting to a denial of constitutional due process was shown.

{¶50} Appellant's sole assignment of error is overruled.

{¶51} The judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE

WSG:clw 0916

[Cite as *State v. Bohanna*, 2010-Ohio-4911.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANIEL N. BOHANNA	:	
Defendant-Appellant	:	CASE NO. 10-CAA-05-0041

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE